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Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis

DAVID S. CAUDILL*

"The success of critical legal studies will be in part determined by the extent to which they succeed in bringing together the diverse theoretical traditions on which they seek to draw."¹

INTRODUCTION

In the growing literature associated with Critical Legal Studies ("CLS"),² one occasionally reads that the movement, in part, employs Freudian ideas.³ The same is said of the Frankfurt School,⁴ but one can easily point to the writings of Herbert Marcuse⁵ and Erich Fromm⁶ for unambiguous developments and revisions of Freud's work. While numerous references to Freudian psychoanalysis or social theory appear in CLS scholarship,⁷ the connection between Freud and CLS is not clear. Indeed, Robin West's recent exposition of Freudian jurisprudence counts critical legal theorists among Freud's opponents.⁸

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1. Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1, 3 (1986).

2. See, e.g., Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984). A bibliography of recent CLS-oriented articles, symposia and books appears in each issue of the *Newsletter of the Conference on Critical Legal Studies* edited by Alan Freeman and Betty Mensch at SUNY Buffalo Law School.

3. See, e.g., Kelman, *Trashing*, 36 STAN. L. REV. 293, 304 (1984); Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 607 (1984).

4. See, e.g., Johnson, *Do You Sincerely Want To Be Radical?*, 36 STAN. L. REV. 247, 250 (1984); Trubek, *supra* note 3.

5. See H. MARCUSE, *EROS AND CIVILIZATION, A PHILOSOPHICAL INQUIRY INTO FREUD* (1955).

6. See E. FROMM, *THE CRISIS OF PSYCHOANALYSIS: ESSAYS ON FREUD, MARX AND SOCIAL PSYCHOLOGY* (1970).

7. See *infra* notes 112-19 and accompanying text.

8. West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986). Of course, Freud's writings are sufficiently ambiguous to inspire various and conflicting interpretations of his theories.

This Article explores the use of Freudian concepts in CLS. However, because of the scattered and often incongruous references to Freud in CLS writings, and the attendant necessity of relying upon literature outside the CLS canon (including Freud's own work and the work of some of his disciples, revisionists and critics), the present effort includes an inquiry as to what Freud *might* mean to CLS. More generally, this Article should offer some insights as to how CLS—an amalgam of many intellectual movements and methodological techniques—borrows from (and assumes familiarity with) various theoretical traditions.

In Part I, I consider the problems inherited by CLS as a critique of legal ideology, namely the difficulties in defining ideology and describing its operation, and the need for self-criticism on the part of the ideology critic. In Part II, I briefly re-introduce several of Freud's famous notions about the individual and society. Part III consists of a series of qualifications and distinctions concerning the somewhat narrow scope of this analysis, all necessitated by the understated fact that Sigmund Freud, like Karl Marx, is a major figure in Western thought and society. Much of Freud's writing and influence will thus be ignored in the pages that follow.

Parts IV and V discuss, respectively, the so-called Freudian Left⁹ (especially Marcuse) and the influence of Freud on Structuralists (especially Jacques Lacan). Neo-Marxian Critical Theory and Structuralism generally are acknowledged to be foundational to much that we call CLS scholarship.¹⁰ In Part VI, I explore several actual and possible connections between CLS and the Freudian tradition, and conclude by suggesting some avenues for clarifying and developing that relationship. Finally, Part VII focuses on the use of Freudian concepts in the explication and critique of legal ideology, with particular reliance upon Lacan (and Althusser's commentary on Lacan), Peter Gabel and the early Habermas.

The primary aim of this study is not to explain Freud's views, as legions have done already, but rather to contribute to the understanding of CLS and its potential in American legal scholarship.

I. CLS AS A CRITIQUE OF LEGAL IDEOLOGY

While there is no central or core theory shared by all scholars associated with CLS, conceiving the eclectic movement as a form of ideology-critique helps to explain the methodology and terminology of many CLS adherents. Ideologies, in the sense of worldviews or cultural belief systems, generate and inform communal life and thought. When an ideology is hidden (or

9. See P. ROBINSON, *THE FREUDIAN LEFT: WILHELM REICH, GEZA ROHEIM, HERBERT MARCUSE* (1969).

10. See generally Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209 (1985-86).

unconscious), its power to obscure alternatives and to create false necessities is greatest. The critique of ideology seeks to disclose belief systems not only to enhance understanding and meaningful communication within a community, but to challenge and change social processes. Two problems, however, confront the ideology critic. First, is there evidence of ideologies, and how they operate, for example, within legal processes and institutions? Second, how does the critic overcome his or her own belief system, or, more generally, on what basis does the critic recommend change?

"Ideology" has various meanings. In some Marxian formulations, the term has pejorative connotations—ideology as false consciousness—and refers to that which masks social contradictions and thereby legitimizes oppressive institutions.¹¹ "Ideology" is also used to describe the coherent set of collective beliefs of any social group.¹² In CLS literature, the term "ideology" often connotes "the beliefs that individuals hold about law or the set of beliefs, ideas, and values embodied in the legal institutions and legal materials . . . of a particular society."¹³ However, ideologies also operate, according to some CLS scholars, to marginalize alternatives and distort social knowledge—a pejorative sense of the term.¹⁴

Some political theorists and sociologists have questioned the assumption that members of a society share a common set of beliefs that constitutes common sense or that legitimizes asymmetrical relations of power. David McLellan theorizes that a dominant ideology will generally be accepted by the ruling class, but that lower classes may be ignorant of, or indifferent to, the dominant ideology.¹⁵ John Thompson argues that societies are more likely "stabilized by virtue of the diversity of values and beliefs and the proliferation of divisions between individuals and groups."¹⁶ Ideology, for Thompson, is not grounded in consensus, but in everyday language where

11. See R. GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 12-19 (1981). For an example of such an approach with respect to legal ideology, see M. TIGAR & M. LEVY, *REFLECTIONS ON LAW, CAPITALISM, AND LEGAL HISTORY* (1977), reviewed by Koffler, *Review Essay*, III ALSA FORUM 67 (Dec. 1978).

12. See R. GEUSS, *supra* note 11, at 9-10. Attempts to define ideology continue to appear in sociological and political literature. Lewins suggests that the preoccupation with the *function* of ideology in society, associated with Marxian approaches, has eclipsed questions of the content of ideology. Lewins, *Recasting the Concept of Ideology: A Content Approach*, 40 BRIT. J. SOC. 678 (1989). For a recent functionalist account, see Nielson, *The Concept of Ideology: Some Marxist and Non-Marxist Conceptualizations*, 4 RETHINKING MARXISM 146, 169 (Nov. 4, 1989) (The author argues that conceptions of ideology as any set of closely related ideas or beliefs tend to miss "the way in which ideologies help generate hegemonic, ruling-class ideas which will make people come to accept a social order which sustains the interests of that dominant class.").

13. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 376 (1984).

14. *Id.* at 377-79.

15. D. McLELLAN, *IDEOLOGY* 73 (1986).

16. J. THOMPSON, *STUDIES IN THE THEORY OF IDEOLOGY* 5 (1984).

"meaning is mobilized in defense of [relations of] domination."¹⁷ The study of ideology is therefore construed as an investigation into "the ways in which meaning (signification)" legitimates, hides and neutralizes power in society.¹⁸

Even if a workable definition of ideology is established as a common set of beliefs or as a set of limitations on thought and power embedded in everyday language, questions remain as to how legal ideology works—how is "the population in general or some particular section . . . influenced by the ideological products of the legal process?"¹⁹ Compounding the problem, a program of ideology-critique proceeds in the shadow of its own ideology, and critics must account, in a process of self-reflection, for their own ideological presuppositions or, in another formulation, their given, linguistic framework. Critical legal theorists can escape neither belief nor language in their analyses of legal culture.

These problems, coupled with the recurring accusations that CLS literature is vague, incomprehensible, impractical and nothing but Legal Realism revisited, plague critical legal research. My thesis is that psychoanalytic theory offers insights with which to confront some of the problematic aspects of CLS—insights that are already contained within the radical traditions on which CLS draws.

II. FREUDIAN PSYCHOLOGY

A. *Influence and Ideas*

Within the history of psychology, Sigmund Freud's psychoanalytic theories represent (in Kuhnian terms) a revolutionary breakthrough between paradigms. As with Einstein in physics, we identify pre-Freudian and post-Freudian perspectives on the problems of the discipline.²⁰ Freudian

17. *Id.* at 35, 61; cf. Kavanagh, *Ideology*, in *CRITICAL TERMS FOR LITERARY STUDY* 312 (F. Lentricchia & T. McLaughlin eds. 1990) ("[I]deological analysis maintains its edge—that which prevents it from becoming a form of social psychology—only by keeping our eyes on the relations of cultural texts to questions of politics, power, and/or class.").

18. J. THOMPSON, *supra* note 16, at 35, 131; cf. Brenkman, *The Other and the One: Psychoanalysis, Reading*, in *LITERATURE AND PSYCHOANALYSIS: THE QUESTION OF READING: OTHERWISE* 396 (S. Felman ed. 1982).

Lévi-Strauss' studies of mythic thought and symbolic exchange in primitive societies, Barthes' analysis of the cultural products and practices of consumer society as a specific mode of semiological connotation, and Derrida's deconstructive reading of philosophy, which treats "concepts" not as instances of consciousness grasping truth or reality but as elements within a textual process—all of these researches [sic] have made it possible to consider "ideology" as discourse or semiological operation or text.

Id. at 445.

19. Hunt, *supra* note 1, at 12.

20. See Mujeeb-ur-Rahman, *The Freudian Paradigm*, in *THE FREUDIAN PARADIGM: PSYCHOANALYSIS AND SCIENTIFIC THOUGHT* 3 (M. Mujeeb-ur-Rahman ed. 1977).

psychoanalysis has also influenced sociology²¹ and political theory,²² as well as literature, art, education, religion and other disciplines.²³ Perhaps most important, however, is the popularly acknowledged impact of Freud on our lives in general.²⁴ "Much that was new in psychoanalysis has become accepted wisdom in our culture and has been absorbed even by people who have not read Freud[]"²⁵

At the same time, many of Freud's formulations have been ignored or have met with hostility in academia.²⁶ Freudian theory is often the source

21. See R. BOCOCK, SIGMUND FREUD 7-8 (1983) (noting the influence of Freud upon Talcott Parsons and Erik Erikson).

22. See *id.* (noting the influence of Freud upon Horkheimer, Marcuse and Habermas).

23. C. HALL, A PRIMER OF FREUDIAN PSYCHOLOGY 17 (1954); see Meltzer, *Editor's Introduction: Partitive Plays, Pipe Dreams*, 13 CRITICAL INQUIRY 215 (1987). The introduction is to a symposium entitled *The Trials of Psychoanalysis* in which Hall writes:

Psychoanalysis has infiltrated such diverse areas as literature (to which it owes its myths), linguistics, philosophy, anthropology, history, feminism, psychology, archeology, neurology, to name some. And it is in the notion of "some," perhaps, that lies the crux of the problem. For there is in psychoanalysis an overt conviction that it exists as the ultimate totality, of which everything else is a part.

Id. at 216.

With respect to literature, see generally Brooks, *The Idea of a Psychoanalytic Literary Criticism*, 13 CRITICAL INQUIRY 334, 336 (1987) (discussing traditional psychoanalytic criticism, which tends to analyze either "the author, the reader, or the fictive persons of the text," and arguing for a return to the text). Brooks asserts:

[P]sychoanalytic perspectives in literary study must ultimately derive from our conviction that the materials on which psychoanalysts and literary critics exercise their powers of analysis are in some basic sense the same: that the structure of literature is in some sense the structure of the mind—not a specific mind, but . . . the dynamic organization of the psyche, a process of structuration.

Id. at 336-37 (emphasis in original); see also E. WRIGHT, PSYCHOANALYTIC CRITICISM: THEORY IN PRACTICE (1987) (discussing criticism of art and literature generally); FREUD AND THE HUMANITIES (P. Horden ed. 1985) (anthology including contributions on biography, art history and classical studies).

On the use of psychoanalysis in historical studies, see generally P. GAY, FREUD FOR HISTORIANS (1985) (arguing that psychoanalytic interpretation is essential to historical interpretation). See also LaCapra, *History and Psychoanalysis*, 13 CRITICAL INQUIRY 222 (1987) (arguing that historical analysis is inherently a part of psychoanalysis).

24. See Gelman, *Finding the Hidden Freud*, NEWSWEEK, Nov. 30, 1981, at 64 ("[Freud] gave the world more than a theory and a therapy. He provided a world view. His ideas about dreams, religion, creativity and the unconscious motivations underlying all human behavior are so pervasive that it would be difficult to imagine twentieth-century thought without them.").

25. S. FROSH, THE POLITICS OF PSYCHOANALYSIS: AN INTRODUCTION TO FREUDIAN AND POST-FREUDIAN THEORY 1 (1987) (Freudian "concepts of repression, sexual desire and the unconscious [are] often implicit in [our] 'common-sense' understandings of ourselves and each other.").

26. See, e.g., Y. GABRIEL, FREUD AND SOCIETY 2 (1983); A. GRÜNBAUM, THE FOUNDATIONS OF PSYCHOANALYSIS: A PHILOSOPHICAL CRITIQUE (1984) (questioning the clinical credentials of psychoanalysis and identifying fallacies in Freudian methodology). But see Sachs, *In Fainness to Freud: A Critical Notice of THE FOUNDATIONS OF PSYCHOANALYSIS* by Adolf Grünbaum, 98 PHIL. REV. 349, 351 (1989) (arguing that Grünbaum's study contains "major misreadings of

of controversy, especially among psychiatrists, and it continues to challenge traditional ways of thinking about human nature.²⁷

While the theories and influence of psychoanalysis are the subjects of thousands of books and articles, one may identify several key ideas associated with Freud. First, the recognition of sexuality as a fundamental and complex motivational force, and the theory of repression in which painful desires and ideas are driven into the unconscious, have been considered two of Freud's major discoveries.²⁸ Second, Freud is primarily responsible for the therapeutic approach that promises access to the dynamics of mental life.²⁹ Third, and most important for the present study, Freud's later writings

Freud").

In the popular press, a recent issue of *The Atlantic Monthly* included a report on Allan Hobson's challenge to Freud's dream theories. See Dolnick, *What Dreams are (Really) Made Of*, ATLANTIC MONTHLY, July 1990, at 41-61.

27. S. FROSH, *supra* note 25, at 1. See generally Gilman, *The Struggle of Psychiatry with Psychoanalysis: Who Won?*, 13 CRITICAL INQUIRY 293 (1987) (containing a brief history of the "struggle" with attention to the questions of the "scientific" or medical status of psychoanalysis).

28. Y. GABRIEL, *supra* note 26, at 1; see S. FREUD, FIVE LECTURES ON PSYCHO-ANALYSIS 21-28, 40-48 (J. Strachey ed. & trans. 1957) (second and fourth lecture respectively) [hereinafter S. FREUD, FIVE LECTURES]. The second lecture (of five given at Clark University in 1909) describes the concept of repression, while the fourth lecture explains the Freudian emphasis on sexuality. Freud openly acknowledged

that this assertion of [the predominance of erotic life] will not be willingly believed. Even workers who are ready to follow my psychological studies are inclined to think that I over-estimate the part played by sexual factors

Unluckily even doctors are not preferred above other human creatures in their personal relation to questions of sexual life, and many of them are under the spell of the combination of prudery and prurience which governs the attitude of most "civilized people" in matters of sexuality.

Id. at 40-41. Of course, critics of Freudianism remind us that Freud did not "discover" the unconscious—a concept pre-dating psychoanalysis, and also that modern schools of psychology place less emphasis on sexuality than did Freud. On the latter point, see D. SCHULTZ, A HISTORY OF MODERN PSYCHOLOGY 356 (3d ed. 1981). Regarding early conceptions of the "Unconscious," see Meltzer, *Unconscious*, in CRITICAL TERMS FOR LITERARY STUDY, *supra* note 17, at 147-48.

29. S. FROSH, *supra* note 25, at 2; see S. FREUD, AN AUTOBIOGRAPHICAL STUDY 74-90 (J. Strachey trans. 1952) (originally appeared in 1925 in a collection of autobiographical studies, by leaders in medicine, entitled *Die Medizin der Gegenwart in Selbstdarstellungen*; Strachey's translation was first published in the United States in 1927) [hereinafter S. FREUD, AN AUTOBIOGRAPHICAL STUDY]. Freud here explains the method of *free association*, analytical interpretation, transference (an intense emotional relationship between patient and analyst wherein the patient re-experiences repressed emotions), and the importance of dreams and everyday *slips* and mistakes to psychoanalysis. The latter phenomena (dreams, slips and mistakes) of normal life parallel, for Freud, pathological symptoms, since explanation of such phenomena requires "the same assumptions—the repression of impulses, substitute-formation, compromise-formation, the dividing of the conscious and the unconscious into various psychical systems" *Id.* at 90. Therefore,

psychoanalysis was no longer a subsidiary science in the field of psychopathology, it was rather the foundation for a new and deeper science of the mind which would be equally indispensable for the understanding of the normal. [A] path lay open to it that led far afield, into spheres of universal interest.

Id.

suggest that the concepts of sexuality, repression and the unconscious, as well as the psychoanalytic therapeutical method, are not only significant for understanding and helping the individual, but are useful in social analysis.³⁰

B. *Dynamics of the Mind*

As is well-known, Freud's later theory of personality introduced three mental systems: the id, the ego and the super-ego. The id is the primary, subjective reality, existing prior to the individual's experience of the world. Driven by instinct, it functions, in the service of the primordial *pleasure principle*, to avoid pain and find pleasure.³¹ The id may be bound or controlled, however, by the ego, a secondary mental process, which is in turn governed by the *reality principle*.³² The reality of the external world requires thinking or problem-solving, a plan of action and control of instinctual desires. The ego also, in its adjustment function, governs the super-ego, which consists of moral ideals and the conscience, including traditional values and other social ideals learned in childhood.³³ Roughly,

30. See generally R. BOCK, *supra* note 21. See, e.g., S. FREUD, *THE FUTURE OF AN ILLUSION* (W.D. Robson-Scott trans. & J. Strachey ed. 1964) (first appeared in translation in 1927) [hereinafter S. FREUD, *THE FUTURE OF AN ILLUSION*]; S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (J. Strachey ed. & trans. 1961) (first appeared in translation, by J. Riviere, in 1930) [hereinafter S. FREUD, *CIVILIZATION AND ITS DISCONTENTS*]. In writing these books, Freud remarked:

I perceived ever more clearly that the events of human history, the interactions between human nature, cultural development and the precipitates of primeval experiences (the most prominent example of which is religion) are no more than a reflection of the dynamic conflicts between the ego, the id, and the super-ego, which psychoanalysis studies in the individual—are the very same processes repeated upon a wider stage.

S. FREUD, *AN AUTOBIOGRAPHICAL STUDY*, *supra* note 29, at 138 (1935 postscript to the 1929 translation).

Significantly, however, Freud's later writings on society are *not* the primary materials for radical social psychoanalytic theory. Lacan's "return to Freud," discussed below, "is essentially a return to the spirit of the earlier works." R. HARLAND, *SUPERSTRUCTURALISM: THE PHILOSOPHY OF STRUCTURALISM AND POST-STRUCTURALISM* 34 (1987). "The radical aspect of Freud lies precisely in the clinical origins and usage of his theories," not in his later "philosophic aspirations." P. ROAZEN, *FREUD: POLITICAL AND SOCIAL THOUGHT* 17-18 (1968).

31. C. HALL, *supra* note 23, at 22-27; see S. FREUD, *THE EGO AND THE ID* 9-17 (J. Riviere trans. & J. Strachey ed. 1960) (first appeared in translation in 1927) [hereinafter S. FREUD, *THE EGO AND THE ID*]; S. FREUD, *AN OUTLINE OF PSYCHO-ANALYSIS* 14-18 (J. Strachey trans. & ed. 1949) (first appeared in translation in 1940) [hereinafter S. FREUD, *AN OUTLINE OF PSYCHO-ANALYSIS*].

32. C. HALL, *supra* note 23, at 27-31; see also Freud, *Formulations Regarding the Two Principles in Mental Functioning* (1911) (M.N. Searl trans.), in S. FREUD, *GENERAL PSYCHOLOGICAL THEORY* 21-28 (P. Rieff ed. 1963) [hereinafter S. FREUD, *GENERAL PSYCHOLOGICAL THEORY*].

33. C. HALL, *supra* note 23, at 31-35. We "see this same ego as a poor creature owing service to three masters and consequently menaced by three dangers: from the external world, from the libido of the id, and from the severity of the super-ego." S. FREUD, *THE EGO AND THE ID*, *supra* note 31, at 46; see also S. FREUD, *AN AUTOBIOGRAPHICAL STUDY*, *supra* note 29, at 113 ("The super-ego represents the ethical standards of mankind.").

then, the id corresponds with biological processes, the ego with the higher mental processes (and interaction with reality) and the super-ego with socialization and cultural tradition.³⁴

Faced with the frustrations, conflicts and anxieties of life, the ego may seek realistic solutions or deny, falsify or distort reality through various defense mechanisms.³⁵ Repression, for example "forces a dangerous memory, idea, or perception out of consciousness," and thereby blinds a person to the internal or external threat.³⁶ Projection, another defense mechanism, is the process of objectifying neurotic or moral anxiety, wherein the individual unconsciously rationalizes away personal responsibility by blaming another.³⁷ As with repression, projection is an escape from conscious self-examination and results in a distortion of reality. Reaction formations likewise hide awareness of an instinct by concentrating on its opposite.³⁸ As

34. C. HALL, *supra* note 23, at 34. For a discussion of the other elements involved in Freud's theory of personality, including distribution and disposal of psychic energy, instincts, cathexis and anti-cathexis and the various forms of anxiety, see *id.* at 36-71.

35. *Id.* at 85; see S. FREUD, AN OUTLINE OF PSYCHO-ANALYSIS, *supra* note 31, at 52-61.

[The] ego is fighting on two fronts: it has to defend its existence against an external world that threatens it with annihilation and against an internal world that makes excessive demands. It adopts the same methods of defense against [both]

Whatever the ego [does in efforts of defense,] whether it is repudiating a portion of the external world or whether it seeks to reject an instinctual demand from the internal world, its success is never complete and unqualified [I]t is only necessary to remark what a small proportion of all these processes become known to us through our conscious perception.

Id. at 111-12, 119.

36. C. HALL, *supra* note 23, at 86; see S. FREUD, FIVE LECTURES, *supra* note 28, at 21-

28. Freud identified, in his early studies of patients suffering from hysteria, a wishful impulse which was in sharp contrast to the subject's other wishes and which proved incompatible with the ethical and aesthetic standards of his personality. [The] idea which had appeared before consciousness as the vehicle of this irreconcilable wish fell a victim to repression, was pushed out of consciousness with all its attached memories, and was forgotten. [Repression] was thus revealed as one of the devices serving to protect the mental personality.

Id. at 24.

37. C. HALL, *supra* note 23, at 89-91; see S. FREUD, BEYOND THE PLEASURE PRINCIPLE 23 (J. Strachey trans. & ed. 1961) (first translated in 1922 by C.J.M. Hubback).

[A] particular way is adopted of dealing with any internal excitations which produce too great an increase of displeasure: there is a tendency to treat them as though they were acting, not from the inside, but from the outside, so that it may be possible to bring the shield against stimuli into operation as a means of defence against them. This is the origin of *projection*

Id. (emphasis in original).

38. C. HALL, *supra* note 23, at 91-93. Freud wrote:

In the obsessional neurosis, as we know, the phenomena of reaction-formation predominate

The reproaches of conscience in certain forms of obsessional neurosis are just as painful and tormenting [as in melancholia, but it] is remarkable that the

an example, extreme notions of chastity may be a denial of one's sexual desires; more generally, rigid conformity with any social rules may be a denial of one's rebellious desires. Fixation and regression, also defense mechanisms, are related to stopping or reversing psychological growth to avoid anxiety.³⁹ In all of these cases, the ego deals with anxieties by distorting or denying reality.⁴⁰

Freud's early work on hypnotism with Josef Breuer convinced him that some psychological afflictions are caused by repressed episodes, and that if a patient can bring to consciousness and verbally express his or her feelings, the affliction may be cured.⁴¹ The psychoanalytic method as developed by Freud involved overcoming the patient's predictable resistance and then analyzing and interpreting the previously unconscious material.⁴² For

obsessional neurotic, in contrast to the melancholic [whose strong super-ego "rages against" the ego], never takes the step of self-destruction; he is as if immune against the danger of suicide. We can see that what guarantees the safety of the ego is the fact that the object has been retained. In obsessional neurosis it has become possible for the love-impulses to transform themselves into impulses of aggression against the object. Here again the instinct of destruction has been set free and it aims at destroying the object, or at least it appears to have this aim. These tendencies have not been adopted by the ego; it struggles against them with reaction-formations and they remain in the id.

S. FREUD, *THE EGO AND THE ID*, *supra* note 31, at 75-78.

39. C. HALL, *supra* note 23, at 93-97; see S. FREUD, *AN OUTLINE OF PSYCHO-ANALYSIS*, *supra* note 31, at 27 ("It has been found that in early childhood there are signs of bodily activity to which only ancient prejudice could deny the name of sexual, and which are connected with mental phenomena that we come across later in adult love, such as fixation to a particular object, jealousy, and so on."); see also Freud, *Three Contributions to the Theory of Sex*, in *THE BASIC WRITINGS OF SIGMUND FREUD* 553-629 (A.A. Brill ed. & trans. 1938). "All the factors which injure the sexual development show their effect in that they produce a *regression*, or a return to a former phase of development." *Id.* at 626-27 (emphasis in original).

40. C. HALL, *supra* note 23, at 96.

41. Brill, *Introduction to THE BASIC WRITINGS OF SIGMUND FREUD*, *supra* note 39, at 7-9. Freud recognized that symptoms are over-determined, that is, caused by many psychological events. See S. FREUD, *FIVE LECTURES*, *supra* note 28, at 38.

In his account of one of Breuer's patients, who suffered from "hysteria," Freud observes that when "she was put under hypnosis, it was possible, at the expense of a considerable amount of labor, to recall the scenes to her memory; and, through this work or recollecting, the symptoms were removed." *Id.* at 19. Freud, of course, abandoned hypnotism in favor of the "talking" cure and eventually the process of free association. See S. FREUD, *AN AUTOBIOGRAPHICAL STUDY*, *supra* note 29, at 48-76.

42. Brill, *supra* note 41, at 10. In one of Freud's formulations:

The analyst, who listens composedly but without any constrained effort to the stream of associations and who, from his experience, has a general notion of what to expect, can make use of the material brought to light by the patient according to two possibilities. If the resistance is slight he will be able from the patient's allusions to infer the unconscious material itself; or if the resistance is stronger he will be able to recognize its character from the associations, as they seem to become more remote from the subject, and will explain it to the patient

Thus the work of analysis involves an *art of interpretation*

S. FREUD, *AN AUTOBIOGRAPHICAL STUDY*, *supra* note 29, at 77 (emphasis in original). Freud

example, anxiety hysteria, a form of transference neurosis, symbolizes or dramatizes for the analyst a conflict between the id and the ego, the primitive and the ethical self; similarly, psychosis results from a conflict between the ego and the external world, and narcissistic neurosis from a conflict between the ego and the super-ego.⁴³ Significantly, these disturbances are, for Freud, present in varying degrees in all people.⁴⁴ Thus, everyday jokes, slips of the tongue, fantasies and dreams reveal the workings of the unconscious and the universality of the illusions and tensions within each person's mind.

Although psychoanalysis grew into an international movement in the decades following Freud's death (infiltrating much of Western social and literary study) and then fell into disrepute among mainstream psychologists, a renewed interest in Freud and the psychoanalytic tradition is apparent outside the discipline of psychology and even within some of the discipline's movements (such as object-relations theory).⁴⁵ That tradition, neophytes quickly realize, is a picture of disagreement and uncertainty. Beyond mere revisionism, some schools of thought inspired by Freud have developed theories that are fundamentally different from Freud's.⁴⁶ Nevertheless, nearly all psychoanalytic approaches seem to share the concept of a dynamic and ordinarily inaccessible unconscious in which the residues of childhood and various instinctual (especially sexual) impulses motivate everyday thought and action.⁴⁷

also posited a pre-conscious, midway between the conscious and the unconscious, "which contains memories of which one is unaware, but which one can eventually recall with some effort." Brill, *supra* note 41, at 13; see Freud, *A Note on the Unconscious in Psychoanalysis* (1912), in S. FREUD, *GENERAL PSYCHOLOGICAL THEORY*, *supra* note 32, at 49-55.

43. Brill, *supra* note 41, at 12; see Freud, *Neurosis and Psychosis* (1924), in S. FREUD, *GENERAL PSYCHOLOGICAL THEORY*, *supra* note 32, at 185-89.

44. See S. FREUD, *CIVILIZATION AND ITS DISCONTENTS*, *supra* note 30, at 28. "[E]ach one of us behaves in some respect like a paranoic, corrects some aspect of the world which is unbearable to him by the construction of a wish and introduces this delusion into reality." *Id.*, see also S. FREUD, *AN AUTOBIOGRAPHICAL STUDY*, *supra* note 29.

45. S. FROSH, *supra* note 25, at 2. In "sociology, literature, film studies and philosophy, as well as in Marxist and feminist theory, there has been an enormous burgeoning of interest in psychoanalysis in recent years." *Id.* at 11.

46. For example, Lacan's model of the psyche (from Freud's earlier works), which identifies the conscious, the pre-conscious and the unconscious, does not really correspond to Freud's more developed id/ego/super-ego model. The concept of the super-ego implies a superficial societal influence on a more basic, individual self's id and ego. In Lacan's unconscious, society precedes individuality, and Lacan's ego or pre-conscious is a center of resistance rather than the healthy and rational self. See generally R. HARLAND, *supra* note 30, at 37-38 (citing J. LACAN, *ÉCRITS: A SELECTION* 23 (A. Sheridan trans. 1977)).

47. S. FROSH, *supra* note 25, at 2; see also *id.* at 3-5 (discussing ego analysis, object-relations theory, Kleinian theory and Lacanian theory). Robert Wallerstein argues that the various schools of psychoanalysis, including ego-psychology, object-relations theory, self psychology, as well as the Kleinians, Bionians and Lacanians, share a common ground in their clinical methods notwithstanding their obvious theoretical diversity. Wallerstein, *Psychoanalysis: The Common Ground*, 71 INT'L J. PSYCHO-ANALYSIS 3 (1990).

C. *Freud and Society*

While psychoanalysis can be viewed solely as an explanatory model for individual human behavior, "it also contains the possibilities for an approach that analyzes the mechanisms by which the social world enters into the experience of each individual, constructing the human 'subject' and reproducing itself through the perpetuation of particular patterns of ideology."⁴⁸ Just as the individual represses threatening ideas, society represses the individual.⁴⁹ Just as the individual seeks to control powerful instincts, "civilization is built upon a renunciation of instinct."⁵⁰ Freud believed that the primordial and dangerous passions of the individual must be controlled by inherently oppressive social structures.⁵¹ While these discoveries may be helpful in social analysis, one immediately notices that they invite pessimism and provide the basis for an implied conservatism rather than for a radical or utopian critique of the status quo.

However, Freud's views on sexuality, a seemingly individual and private matter, are particularly instructive for radical social analysis. First, if one accepts Freud's thesis that infants have a rich sexual life—a polymorphous perversity that seeks pleasure without inhibitions—then social repression of such infantile sexuality is, at some point on the road to adulthood, justified. The implication is that "normal" sexuality is not biological and that, in anthropological terms, different societies will have different views of normality, and in critical terms, alternatives to socially acceptable sexuality are imaginable.⁵² Second, and more important to the present study, is "the recognition that what Freud describes is the way society enters into the essence of the human individual, organizing the instincts where usually we consider that we are most privately ourselves."⁵³

In the radical Freudian scheme, it is *not* that an already established individual consciousness is conditioned or shaped by social interaction, but

48. S. FROSH, *supra* note 25, at 11.

49. See N. BROWN, *LIFE AGAINST DEATH* 3 (1959); H. MARCUSE, *supra* note 5, at 11.

50. S. FREUD, *CIVILIZATION AND ITS DISCONTENTS*, *supra* note 30, at 44.

51. S. FROSH, *supra* note 25, at 40. See generally S. FREUD, *CIVILIZATION AND ITS DISCONTENTS*, *supra* note 30.

52. S. FROSH, *supra* note 25, at 46. Regarding Freud's views on infantile sexuality, see S. FREUD, *FIVE LECTURES*, *supra* note 28, at 40-48.

A child has its sexual instincts and activities from the first; it comes into the world with them; and, after an important course of development passing through many stages, they lead to what is known as the normal sexuality of the adult. There is even no difficulty in observing the manifestations of these sexual activities in children; on the contrary, it calls for some skill to overlook them or explain them away.

Id. at 42.

53. S. FROSH, *supra* note 25, at 46.

rather that society has an unconscious and formative effect on individual experience and perception of oneself and others.⁵⁴ That is, our social relations are "themselves only available because of the particular ideological structures that dominate within a society."⁵⁵ In this view the impulses and feelings that appear to be so much a part of our "selves" are actually products of our socialization.⁵⁶

From the point of view of the critic of ideology, a profound ambivalence persists in Freud's social writings. On the one hand, Freud was not hopeful about radical social change and even criticized such hopes as a mere search for consolation.⁵⁷ On the other hand, the radical tradition inherited from Freud the promise of the power to analyze, "to display the unconscious roots of personal and social action, to make this material open to awareness and hence to make ideology open to inspection and change imaginable."⁵⁸ Freud's preoccupation with illusions, despite his descriptive and positivistic—"scientific"—goals, could not help but suggest the possibilities for emancipation and demystification.⁵⁹

To begin my inquiry, I will revisit two traditions—Critical Theory and Structuralism—that build in part upon Freudian ideas. Significantly, these two traditions are most often identified as the forerunners of critical legal scholarship, and both signal a latent role for psychoanalytic theory in critical legal studies. First, however, the breadth of Freudian scholarship and the narrow scope of the present study must be briefly acknowledged.

III. QUALIFICATIONS AND DISTINCTIONS

In the foregoing summary of Freudian theory, and in the remainder of this study, much of Freud's own work and the work of many of his followers and critics has and will be ignored. While my focus is solely on Freud's relevance for the critical legal enterprise, a series of qualifications will serve to acknowledge other uses of Freud and psychoanalytic theory in law

First, I am almost exclusively concerned with the social aspect of psychoanalysis, although assessing the implications of Freud's theories for society requires attention to his early work on the individual psyche as well as his

54. *Id.* at 46-47.

55. *Id.* at 47. The Oedipus Complex—involving for Freud the incest taboo, desire opposed by authority and internalization of authority—symbolizes the individual encounter with society and describes a possible mechanism by which "social structures are incorporated into individual consciousness and have a formative role on the ordering of the psyche." *Id.* at 48.

56. *Id.* at 52.

57. S. FREUD, *CIVILIZATION AND ITS DISCONTENTS*, *supra* note 30, at 92.

58. S. FROSH, *supra* note 25, at 60.

59. Y. GABRIEL, *supra* note 26, at 4.

later writings about culture. Nor will I discuss the international psychoanalytic movement, which builds upon Freud's clinical work and writings, involves an entire field of research and writing on individual, and especially abnormal, psychology, and is of course part—but not an uncontroversial part—of the practical tradition of psychotherapy and psychiatry⁶⁰

Second, I will limit my commentary to Freud's impact upon the Left and its concerns with ideology, power structures, freedom and criticism of the status quo. I will not attempt to describe either the numerous other movements of Neo-Freudianism or Freudian revisionism,⁶¹ or the general effect of Freudian ideas upon Western culture.⁶²

Third, I am not here concerned with the relationship between Freud and law generally, including the relationship between mainstream law practice and psychiatry or psychology,⁶³ the more traditional views concerning the utility of psychoanalysis for legal scholarship (including Frank's analysis of

60. See generally Restak, *Psychiatry in America*, WILSON Q. 95, 107-12 (Autumn 1983). The American Psychoanalytic Association, founded in 1911, has over 3,000 member analysts, is affiliated with local societies in most major United States cities and accredits over 25 training institutions. See AM. PSYCHOANALYTIC ASS'N, ABOUT PSYCHOANALYSIS (1985). The Association publishes the *Journal of the American Psychoanalytic Association* and holds national meetings annually. Another organization, the National Psychological Association for Psychoanalysis ("NPAP"), derives from the denial of full membership to Theodor Reik, a Freudian who held a Ph.D., rather than an M.D., in the American Psychoanalytic Association. The NPAP publishes *The Psychoanalytic Review* and conducts a training institute.

61. See generally Y. GABRIEL, *supra* note 26; S. FROSH, *supra* note 25. Both books discuss Freud's followers and revisionists. See also E. WRIGHT, *supra* note 23. Wright provides several helpful summaries in the context of literary and art criticism. *Id.* at 56-68 (summarizing ego-psychology); *id.* at 69-76 (summarizing Jungian theory); *id.* at 79-104 (summarizing object-relations theory); *id.* at 107-32 (summarizing structural psychoanalysis); *id.* at 133-56 (summarizing post-structural psychoanalysis); *id.* at 159-74 (summarizing ideology studies in psychoanalysis).

62. See Gelman, *supra* note 24.

63. See generally M. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (1984); Stone, *Psychiatry and the Law*, in THE HARVARD GUIDE TO MODERN PSYCHIATRY, 651-64 (A. Nicholi, Jr. ed. 1978) (containing a brief but comprehensive catalogue of issues, including civil commitment, the insanity defense, competency, capacity, right to treatment and sexual psychopathology). See A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM (1974 & Supp. 1980); D. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE (1986 & Supps. 1988 & 1989).

Sally Lloyd-Bostock's recent book summarizes British approaches to the use of and insights from psychology in dealing with witnesses and suspects, acquiring trial persuasion skills, sentencing, the role of children in legal proceedings and employing psychological and psychiatric experts. S. LLOYD-BOSTOCK, LAW IN PRACTICE: APPLICATIONS OF PSYCHOLOGY TO LEGAL DECISION MAKING AND LEGAL SKILLS (1988). The new textbook by Robert Bastress and Joseph Harbauch considers various theories from psychology (including psychoanalytic, person-centered, behaviorist and others) and their use in interviewing, counseling and negotiation. R. BASTRESS & J. HARBAUCH, INTERVIEWING, COUNSELING, AND NEGOTIATION: SKILLS FOR EFFECTIVE REPRESENTATION (1990). For recent examples of more specific studies in law and psychology, see A. FELTHOUS, THE PSYCHOTHERAPIST'S DUTY TO WARN OR PROTECT (1989); and W. WAGENAAR, IDENTIFYING IVAN: A CASE STUDY IN LEGAL PSYCHOLOGY (1988) (regarding the trial of John Demjanjuk).

the myth of coherency,⁶⁴ Bienenfeld's reconsideration of the Oedipus complex,⁶⁵ Goldstein's warnings concerning the limits of psychoanalysis,⁶⁶

64. Jerome Frank integrates psychoanalytic theory (although rarely mentioning Freud) into his realist critique of law and lawyers. See J. FRANK, *LAW AND THE MODERN MIND* (1930). Frank identifies a basic social myth, unconsciously reinforced by lawyers, that law is precise and coherent, rather than vague and unsettled. *Id.* at 8-9. Acknowledging that his explanation of this myth is partial, Frank analogizes a child's search for security and authority in his or her father with the craving of society for finality and rules in the law, and the role of judges as father-substitutes. *Id.* at 13-31. "[T]he image of the father [is] hidden away in the authority of the law" *Id.* at 269. Legal language, moreover, creates the appearance of such longed-for definiteness and predictability, thereby hiding the inevitable, non-rational bias in legal decisions and processes. *Id.* at 29-32. Frank acknowledges that "relatively superficial" political bias is obvious, but our

most compelling biases have deeper roots and are far better concealed from consciousness.

To admit their existence would be difficult and painful. Most of us are unwilling—and for the most part unable—to concede to what an extent we are controlled by such biases. We are able to delude ourselves by giving "reasons" for our attitudes. So we persuade ourselves that our lives are governed by Reasons.

Id. at 31-32.

The radical implications of Frank's study appear undeveloped in legal scholarship, except in the sense that recent critical legal research inherited the deconstructive (if not the scientific) methods of Legal Realism. Psychoanalysis seems to have been welcomed into law as another "partial" (read "not earthshaking") explanation of law and legal institutions and practices.

65. Franz Rudolf Bienenfeld (1886-1961), an Austrian legal scholar, did not complete his planned book on psychoanalysis and law, but the partial manuscript was eventually published in two parts. Bienenfeld, *Prolegomena to a Psychoanalysis of Law and Justice*, 53 CALIF. L. REV. 957, 1254 (1965). Professor Ehrenzweig remarks, in a preface to the *Prolegomena*, that the book, if completed, "could well have become the definitive psychoanalytical study of law and justice." *Id.* at 959 (preface). Bienenfeld wanted to go beyond earlier psychoanalytical studies of crime and guilt, which over-emphasized Oedipal aggression, toward an acknowledgment of the Oedipal union. *Id.* at 962 ("marital obligations are not conditioned by guilt"). The *Prolegomena* investigates family relations (child/child, parent/child) and claims for justice, which parallel the structure of the state. State production of legal systems is then described, emphasizing law as a system of obligations, with particular reference to psychoanalytic research, Gestalt psychology, Jerome Frank's observations and Piaget's experiments. Bienenfeld analyzes relative obligations ("social" (mother/child) law, "criminal" (father/child) law, "constitutional" (husband/wife) law and "contract" (between siblings) law); the absolute obligation to protect life, safety and property; and procedural laws by which obligations are ascertained. Of interest to the present study, Bienenfeld argues that social law, "which institutionalizes the rules for survival by support," has been neglected (by identifying law with criminal law) in most accounts of the psychological origin of law:

The earliest concept of law has its psychological source in the earliest experience of the mother's directions, guidance, and help in nursing. All elements of law are *in nuce* present in this earliest situation. The institutionalization of social law originates from the desire for support and its satisfaction by the mother.

Id. at 967 (emphasis in original).

For a positive assessment of Bienenfeld's significance for attempts to explain the roles of rationality and values in judicial decisionmaking, see Gottschall, *Bienenfeld's Psychodynamic Model and the Judicial Process: Toward a New Paradigm in Law?*, III ALSA FORUM 33, 34 (Dec. 1978) (dynamic model of the human psyche provides "the missing synthesis for the now rigidly antithetical behavioral and rationalistic approaches to the judicial process").

66. Joseph Goldstein explores the potential contribution of psychoanalysis to legal theory, but remarks that the integration "is not close at hand, and the scant beginning has occurred

Ehrenzweig's "psychosophy,"⁶⁷ and Schoenfeld's contemporary synthesis⁶⁸),

only at a relatively superficial descriptive level." Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053, 1054 (1968). The article is relatively short (25 pages), and the author is as interested in challenging as in establishing the "mutual relevance" of psychoanalysis and law. *Id.* at 1055. "[I]t is important to locate the limits of psychoanalytic theory in understanding the dynamics of law as a product of, stimulator of, and regulator for human behavior." *Id.* at 1059. "Law cannot find in psychoanalysis the moral, political, or social values upon which to base or evaluate its decisions." *Id.*, see also *id.* at 1060-64 (danger of misuse of psychoanalytic insights in criminal trials); *id.* at 1071 (similar events may have different significances to a person over time and to different people at the same time). Goldstein does suggest a positive role for psychoanalysis in, for example, child custody cases, yet re-emphasizes, in his conclusion, that psychoanalysis is just another analytic tool for legal scholars and practitioners. *Id.* at 1076-77. Students expecting a finished or complete psychoanalytical theory will be either "duped or disappointed." *Id.* at 1077.

67. In contrast to Goldstein's emphasis upon psychoanalysis as another partial explanation of legal institutions and processes, see *supra* note 66, Albert Ehrenzweig asserts that "the findings of Freud and of some of his disciples have opened the gate to a new jurisprudence." A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE: ON ETHICS, AESTHETICS, AND "LAW"—ON CRIME, TORT, AND PROCEDURE* 146 (1971) (Ehrenzweig gives this new science a new name: psychosophy); cf. Cavell, *Freud and Philosophy: A Fragment*, 13 CRITICAL INQUIRY 386, 388 (1987) (Freud suggested that "philosophy has been fulfilled in the form of psychoanalysis") (citing Freud, *The Interpretation of Dreams*, in 4 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 144, 145 (J. Strachey ed. & trans. 1953-74)) [hereinafter COMPLETE PSYCHOLOGICAL WORKS]; Berthold-Bond, *Freud's Critique of Philosophy*, 20 METAPHYSOLOGY 274 (1989). Ehrenzweig's thesis that the "age of Plato has yielded to the age of Freud," A. EHRENZWEIG, *supra*, at 5, necessitates for him a comprehensive treatment (Part I) of the history of legal philosophy before turning to psychology and law (Part II). The relationship between aesthetics and law is explored in Part II, and then an effort is made to apply psychoanalytic (or "psychosophic") insights to problems in criminal law, torts and procedure. Ehrenzweig's major theme is that irrational, unconscious feelings at work in the law (e.g., the desire for vengeance in murder and tort cases, and the belief in the effectiveness of adversary proceedings before an "impartial" judge or jury) should be identified as inevitable and then left undisturbed in an effort to reform rational areas of law. See *id.* at 220-21, 258-59, 275. But see Weyrauch, *Taboo and Magic in Law*, Book Review, 25 STAN. L. REV. 782 (1973). In his critical review of *Psychoanalytic Jurisprudence*, Weyrauch writes:

If desire for vengeance is combined with conscious or unconscious racism, it should not be left undisturbed in the interest of limited law reform even if the cost is backlash. Professor Ehrenzweig is the last person to deny this aspect of the problem, as his discussion of civil disobedience [in Nazi Germany] clearly indicates.

Id. at 806-07 (citing A. EHRENZWEIG, *supra*, at 87-95). "Backlash" refers to Ehrenzweig's warning that retributory "aggression, purportedly displaced, may return with a vengeance." A. EHRENZWEIG, *supra*, at 220.

68. C.G. Schoenfeld attempts to synthesize basic Freudian psychoanalysis with law and to suggest applications in constitutional law. C.G. SCHOENFELD, *PSYCHOANALYSIS AND THE LAW* (1973). Beginning with the warning that psychoanalytic explanations "are at best partial," *id.* at 7 (emphasis in original), Schoenfeld identifies (1) the influence of unconscious motives in the criminal and the judge alike, and in society with respect to the punishment of criminals, *id.* at 12-21, 63-64; (2) the super-ego as the moral and ethical standards that originate in the family, *id.* at 22-24; (3) judges as unconscious parent symbols, *id.* at 40; and (4) examples of self-deceptive rationalization (e.g., in legal opinions), projection (e.g., fear of big business), and identification (e.g., with victims of crime), *id.* at 72-101. When Schoenfeld turns to several constitutional problems, his arguments are sometimes simplistic, and therefore tentative. For example, after suggesting that post-Civil War acceptance of judicial review of congressional law might be explained by "the unconscious wish for parental direction" after a traumatic

and Freud's own views on law and legal institutions (although I will address the latter in one limited context⁶⁹). Thus, I will not be concerned with the legal problems of criminal behavior, the insanity defense or the testimony of psychiatric experts, although each are relevant to the general study of psychology and law⁷⁰.

Finally, I will emphasize neither feminism⁷¹ nor the current trends in

event, he calls his explanation "admittedly speculative" and "at best a limited or partial explanation, since it fails to treat of matters that a sociologist, a political scientist, an historian, an economist, or others, might well deem highly relevant." *Id.* at 114 (footnote omitted). Likewise, psychoanalytic insights do not seem promising in solving the judicial-activism-versus-self-restraint debate, except in producing "a greater open-mindedness than now exists." *Id.* at 136-37. Literalism in constitutional interpretation may be explained by the "unconscious remnants of the childhood stage of the omnipotence of words," *id.* at 154; and the balance of powers may unconsciously symbolize the "balance between the powers of parents and their children," *id.* at 202; but "only a beginning has been made," *id.* at 208. Given the controversies surrounding Freudianism, acknowledged by Schoenfeld, *id.* at 208-09, such a deprecatory attitude is understandable.

Schoenfeld's most recent book is an attempt to demonstrate a role for psychoanalysis in law reform. C.G. SCHOENFELD, *PSYCHOANALYSIS APPLIED TO LAW* (1984). He discusses juvenile delinquency, mental illness, punishment of criminals, heroin addiction, discretion and international law. In each case he focuses on unconscious emotional needs that may be overlooked when law is approached as essentially rational and logical.

69. See *infra* notes 158-69 and accompanying text.

70. See *supra* note 63; Richards, *Law, Psychiatry, and Philosophical Analysis* (Book Review), 73 CALIF. L. REV. 1659 (1985).

71. Elizabeth Wright explains that, for Freud, infant sexual instincts are gradually organized into culturally approved adult sexuality: "The match of biological sex with the sexual role determined by society is thus achieved, not given." E. WRIGHT, *supra* note 23, at 14. This "bleak theory of the construction of gender . . . , as was first pointed out [in J. MITCHELL, *PSYCHOANALYSIS AND FEMINISM* (1974)], can be used as an ideological weapon for women to fight their own oppression . . . [It] enables them to demonstrate that gender is symbolic and not biological . . . " *Id.* at 198. The weapon, however, has another edge: "it constructs woman around the phallic sign." *Id.* Thus feminism in general has viewed Freud and his science "as prime perpetrators of patriarchy." Gallop, *Reading the Mother Tongue: Psychoanalytic Feminist Criticism*, 13 CRITICAL INQUIRY 314, 314 (1987).

Feminist ambivalence toward Freudianism continues, for example, in recent psychoanalytic feminist literary criticism, inspired in part by Lacanian psychoanalysis. *Id.* at 314-15 (Lacan promotes "language to a principal role in the psychoanalytic drama and so naturally offers fertile ground for crossing psychoanalytic and literary concerns."). Lacan, however, is often embraced by feminists as "coolly" as Freud, and debate continues as to "how far [Freud and Lacan] may be said to serve the feminist cause." E. WRIGHT, *supra* note 23, at 198. "Gallop is among those feminists who believe that Lacan's doctrine really does go 'beyond the phallus' in that he provided a theory about human identity-formation having a generality that applies no matter what the power-structure is at a given historical moment." *Id.*, see also Kerrigan, *Terminating Lacan*, 88 S. ATLANTIC Q. 993, 997 (1989) ("Lacan's version of psychoanalysis in [sic] unrelievedly biased toward one gender . . . more so than Freud's, despite the enthusiasm of some feminists for *Encore* [LE SEMINAIRE XX. ENCORE (1975)]."); Miller, *The Death of the Modern: Gender and Desire in Marlowe's "Hero and Leander"*, 88 S. ATLANTIC Q. 757, 761 (1989) ("[T]he work of Freud and Lacan is equally informed by transference structures grounded in the principle of paternity.").

With respect to feminist legal criticism of "male" jurisprudence, and Robin West's recent rejection of Peter Gabel's "deeply gendered" account of alienation (which draws on Lacanian psychoanalysis), see *infra* note 195.

literary theory⁷² in my exposition, even though both fields are pertinent to the topic of Freud and the legal Left. Freud's ideas about gender and language continue to inspire scholars and to produce controversies that are important but beyond the scope of this Article. The analysis that follows is based upon my conception of Critical Legal Studies as an ideology critique, and the actual and possible uses of Freudian theory within that framework.

IV. FREUD AND CRITICAL THEORY

"[T]he laws are made by and for the ruling members . . ."

While the contemporary Left is accustomed to, if not always comfortable with, the potential alliance between Marx and Freud, the Frankfurt School's early introduction of psychoanalysis into Neo-Marxian Critical Theory was bold and unconventional.⁷⁴ Max Horkheimer and Theodor Adorno clearly were interested in integrating the two traditions,⁷⁵ notwithstanding the tension between Freud's pessimism (regarding social change) and Marxian revolutionary hopes.

Erich Fromm, for a time, helped to reconcile Marx and Freud, although he later disassociated himself from the Frankfurt School and orthodox Freudianism. Fromm's identification of "psychoanalytic mechanisms as the mediating concepts between individual and society" established for the Neo-

72. See Brooks, *supra* note 23; see also E. WRIGHT, *supra* note 23 (surveying, with respect to theories of literature and the arts, classical Freudian (id-psychology) criticism, post-Freudian (ego-psychology) criticism, archetypal (Jungian) criticism, object-relations theory, structural (Lacanian) psychoanalysis, post-structural psychoanalysis (Derrida and Bloom) and the critique of ideology (Deleuze and Guattari)).

73. Freud, *New Introductory Lectures on Psycho-Analysis*, in 22 COMPLETE PSYCHOLOGICAL WORKS, *supra* note 67, at 206.

74. See generally M. HORKHEIMER & T. ADORNO, DIALECTIC OF ENLIGHTENMENT (J. Cumming trans. 1972). In 1927, for example, the Russian semiologist V.N. Vološinov harshly criticized Freudianism as a bourgeois ideology that privileged biological (and sexual) explanations over the socio-historical. V.N. VOLOŠINOV, FREUDIANISM: A MARXIST CRITIQUE 8-10 (I. Titunik trans. & N. Bruss ed. 1976); *id.* at 80 ("Freudian psychical dynamics and its mechanisms are only a projection into the individual psyche of social interrelationships."). On the other hand, Ernesto Laclau has pointed out that Marxism affirmed:

the opaqueness of the social—the ideological nature of collective representations—which establishes a permanent gap between the real and the manifest senses of individual and social group actions. It is easy to see how it is possible to establish a dialogue with psychoanalysis [by reference to] the action of the unconscious and to the plurality of "systems" established in the various Freudian topographies.

Laclau, *Psychoanalysis and Marxism*, 13 CRITICAL INQUIRY 330, 331 (1987) (A.G. Reiter-McIntosh trans.).

75. See M. HORKHEIMER & T. ADORNO, *supra* note 74; M. JAY, THE DIALECTICAL IMAGINATION 86-87 (1973).

Marxists a Freudian component in social criticism.⁷⁶ Freud's theory of psychic repression of essential needs, for example, is strikingly analogous to Critical Theory's idea of social oppression, and in both cases people are considered to be generally unconscious of the process.⁷⁷

Horkheimer welcomed the growing psychological supplement to Marxian theory, as did Adorno, yet both grew dissatisfied with Fromm's revision of Freud's work.⁷⁸ It was not Fromm, but Herbert Marcuse, who finally rescued for Critical Theory the revolutionary Freud.

Marcuse's *Eros and Civilization* plays several roles for those inspired by Critical Theory and enamored of Freud. First, the book is a criticism of Freudian revisionism. Marcuse retains, at least for their symbolic value, some of the most controversial concepts in Freud's theory: the death instinct, the primal horde and the killing of the primal father. While this "archaic heritage" rejected by the revisionists "defies common sense, it claims, in its defiance, a truth which common sense has been trained to forget."⁷⁹ Second, Marcuse did not accept Freud's pessimism (concerning society) and implied conservatism, finding instead a critical and liberating tendency, or "hidden trend," in psychoanalysis.⁸⁰ Third, Marcuse argued that "Freud's individual psychology is in its very essence social psychology."⁸¹

In the preface to the first edition of *Eros and Civilization*, Marcuse immediately identifies the psychological with the political:

[F]ormerly autonomous and identifiable psychical processes are being absorbed by the function of the individual in the state—by his public existence. [P]rivate disorder reflects more directly the disorder of the whole, and the cure of personal disorder depends more directly than before on the cure of the general disorder.⁸²

External repression, Marcuse continues, is internalized as self-repression; in Freudian categories, the repressions of the ego ("in the service and at the behest of the super-ego")⁸³ became "unconscious, automatic as it were."⁸⁴ Rather than simply accommodating reality, the super-ego enforces *past* reality, the status quo.

76. M. JAY, *supra* note 75, at 91; see E. FROMM, *supra* note 6, at 134.

77. J. KLAPWIK, *DIALEKTIEK DER VERLICHTING* 23 (1976).

78. See M. JAY, *supra* note 75, at 100-06.

79. H. MARCUSE, *supra* note 5, at 60; see *infra* text accompanying notes 159-60 (Robin West's explication of the primal horde and father).

80. *Id.* at 4, 20; see also *id.* at 17 ("The notion that a non-repressive civilization is impossible is a cornerstone of Freudian theory. However, his theory contains elements that break through this rationalization; they shatter the predominant tradition of Western thought and even suggest its reversal.").

81. *Id.* at 16.

82. *Id.* at xxvii.

83. S. FREUD, *THE EGO AND THE ID*, *supra* note 31, at 75.

84. H. MARCUSE, *supra* note 5, at 32.

Marcuse takes seriously Freud's instinct theory, especially the dualism of the Life (or *Eros*) and Death (or *Thanatos*) instincts, in order to advocate liberation from repression of such primary drives. He distinguishes basic repression (necessary for civilization) from *surplus* (or unnecessary) repression, and suggests that the latter is a standard for measuring the repressiveness of each stage in the history of our culture.⁸⁵ Marcuse also emphasizes Freud's distinction between the pleasure principle and the reality principle, but the latter becomes in today's capitalist society the "performance" principle, an instrument of domination. "We designate it as *performance principle* in order to emphasize that under its rule society is stratified according to the competitive economic performances of its members."⁸⁶ Domination becomes rationalized administration, and the life-enhancing energy of *Eros* slowly withers in today's society.

Assessments of Marcuse's synthesis of psychoanalysis and critical social theory vary. Paul Robinson's sympathetic commentary on *Eros and Civilization* suggests not only that Marcuse was *the* Freudian Left, or at least its major figure, but also that Marcuse succeeded in bringing Freudian theory into line with the categories of Marxism.⁸⁷ Stephen Frosh is less impressed, finding that, in Marcuse's individualistic and libertarian analysis, "social relations are reduced to pure, unproblematic and unmediated encounters between totally unalienated individuals." A genuinely radical psychoanalysis, Frosh argues, needs to concern itself with social structures as well as specific others, "themselves the carriers of social and ideological messages."⁸⁸

Before considering the lesson for legal theorists in Marcuse's Freudianism and Frosh's warning, another tradition influenced by Freud and influential in CLS should be considered.

V. FREUD AND STRUCTURALISM

"I suddenly realized . . . that an intellectual movement could be fashionable without being understood."⁸⁹

85. *Id.* at 33.

86. *Id.* at 44 (emphasis in original).

87. P. ROBINSON, *supra* note 9, at 195, 210.

88. S. FROSH, *supra* note 25, at 160.

89. E. KURZWEIL, *THE AGE OF STRUCTURALISM: LÉVI-STRAUSS TO FOUCAULT IX* (1980); see also M. BRADBURY, *MY STRANGE QUEST FOR MENSONGE: STRUCTURALISM'S HIDDEN HERO* 2, 4 (1989) (satire of post-modernist criticism). Bradbury writes:

In fact, and to be honest, there is no doubt that Structuralism-Deconstruction has become, to say the least, *chic*, and the title 'designer philosophy' is, though unfair, not totally off target.

[Structuralism and Deconstruction] are, in the realm of cognition, what Texas is to California in the realm of growth potential and property values, but with the added advantage of not being directly oil-related.

Id. at 2-4 (emphasis in original).

Because Structuralism (and, as I will use the term, various post-structuralisms that are not radically anti-scientific) implies a search for universal mental structures manifested in human behavior, literature, and social relationships and institutions, it is not surprising to find Freudian concepts employed and refined by thinkers in the Structuralist tradition. Lévi-Strauss, a founder of the movement, claimed psychoanalysis, alongside geology and Marxism, as one of his "three mistresses."⁹⁰ His discovery in myths of universal and unifying structures was a type of cultural psychoanalysis, analogous to bringing the unconscious into consciousness.⁹¹ Freudian conceptions of the unconscious continued to be influential in Structuralist thought, especially in the writings of Althusser,⁹² Ricoeur,⁹³ Foucault,⁹⁴ and, less directly, Derrida.⁹⁵ The most obvious integration of psychoanalysis and Structuralism, however, is found in the work of Jacques Lacan.

Even a brief description of Lacan is problematical, for he "makes much of the fact that he cannot be systematized, that he cannot be 'understood,' that to understand him is to reify and misconstrue him . . ."⁹⁶ Given such warnings, the aim of these remarks is less to capture the essence of Lacanian theory than to establish the relationships between psychoanalysis and Structuralism and, more broadly, between psychoanalysis and radical social theory

90. E. KURZWEIL, *supra* note 89, at 14.

91. *Id.* at 19.

92. *See id.* at 39-40; *infra* notes 179-87 and accompanying text.

93. *See* E. KURZWEIL, *supra* note 89, at 87-98; *see also* Ricoeur, *A Philosophical Interpretation of Freud*, in *THE PHILOSOPHY OF PAUL RICOEUR: AN ANTHOLOGY OF HIS WORK* 169 (C. Reagan and D. Steward eds. 1978); Ricoeur, *The Question of Proof in Freud's Psychoanalytic Writing*, in *THE PHILOSOPHY OF PAUL RICOEUR, supra*, at 184 (includes a summary of FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION (D. Savage ed. 1970)).

94. *See* E. KURZWEIL, *supra* note 89, at 199-201, 239. *See generally* M. Foucault, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (R. Howard trans. 1973).

95. *See* Hoy, *Jacques Derrida*, in *THE RETURN OF GRAND THEORY IN THE HUMAN SCIENCES* 54-55 (Q. Skinner ed. 1985).

96. E. KURZWEIL, *supra* note 89, at 136. Kurzweil notes:

As Clara Malraux once told me, people who listened to [the Parisian seminars of] Lacan (including herself) often did not understand what he was saying. Yet they went to hear him and to observe him: he put on the best show in town. His outrageous behavior provided unexpected excitement, and his statements always left his listeners in intellectual suspense.

Kurzweil, *The Freudians*, 57 *PARTISAN REV.* 38, 40 (1990) (excerpt from E. KURZWEIL, *THE FREUDIANS: A COMPARATIVE PERSPECTIVE* (1989)); *see also* E. RAGLAND-SULLIVAN, *JACQUES LACAN AND THE PHILOSOPHY OF PSYCHOANALYSIS* (1987).

Anglophone readers express the hope that someone will explain Lacan to them in their own terms. This is simply impossible. To do so would permit an interlocutor to retain assumed meanings, providing the comfort of resolution, but only the *illusion* of understanding. Lacan intended to bring about a reconceptualization of the conventionally assumed and unquestioned words by which Western people have come to describe themselves.

Id. at x (emphasis in original).

Ego formation occurs, for Lacan, "through distortions analogous to the reflections of mirrors within mirrors . . ." ⁹⁷ He identifies as fundamental the "mirror-stage" in the child's development, the child's initial awareness of itself before the experience can be verbalized or understood. ⁹⁸ This first impression or *image* becomes the basis for construction of a "self" and for all relationships to come. Thereafter, the child becomes aware of the mother (the "other body"), of the father (the "Law") and sexual differences, and of gender roles; concurrently the child discovers language itself. ⁹⁹ The

97. E. KURZWEIL, *supra* note 89, at 137; see J. LACAN, *supra* note 46, at 1-7. Commentators on Lacan have identified, in the Lacanian conception of the ego, "an extreme and controversial interpretation of Freud." B. BENVENUTO & R. KENNEDY, *THE WORKS OF JACQUES LACAN: AN INTRODUCTION* 60 (1986). Lacan "thought there was not enough emphasis on the ego's function of *meconnaissance*—the refusal to acknowledge thoughts and feelings—and that the later Freud put too much emphasis on the ego's adaptive functions." *Id.* at 52. Parting "company with other analytic schools in his view of the ego," Lacan suggests that "the ego's function is purely imaginary, and through its functions the subject tends to become alienated." *Id.* at 60; see J. LACAN, *supra* note 46, at 22:

Freud seems . . . to fail to recognize the existence of everything that the ego neglects, scotomizes, misconstrues in the sensations that make it react to reality, everything that it ignores, exhausts, and binds in the significations that it receives from language: a surprising *meconnaissance* on the part of the man who succeeded by the power of his dialectic in forcing back the limits of the unconscious.

Lacan was "opposed to any idea of adjustment to the social environment, and his writings abound with a tireless polemic against such a notion." B. BENVENUTO & R. KENNEDY, *supra*, at 61 (the "ego's mastery of the environment is always an illusory mastery" for Lacan).

As an aside, it is worth mentioning that Lacan's model of the conscious subject is divided into two parts or functions, the *moi* (roughly, the ego, with identificatory functions) and the *je* (the speaking subject). See generally E. RAGLAND-SULLIVAN, *supra* note 96, at 1-67.

[T]he terms "ego" or "self" are misleading in understanding Lacan's concept of the subject, since they imply a wholeness or totality that he refuted by his literal reformulation of the Freudian idea of an *Ichspaltung* or a splitting of the subject.

Id. at 2 (emphasis in original). Both the *moi* and the *je*, in the Lacanian scheme, "participate" in both the conscious and unconscious "systems." *Id.* at 42.

98. E. KURZWEIL, *supra* note 89, at 142-43; see J. LACAN, *supra* note 46, at 2 (emphasis in original):

We have only to understand the mirror stage *as an identification*, in the full sense that analysis gives to the term: namely, the transformation that takes place in the subject when he assumes an image . . . This jubilant assumption of his specular image by the [infant] would seem to exhibit in an exemplary situation the symbolic matrix in which the *I* is precipitated in its primordial form, before it is objectified in the dialectic of identification with the other, and before language restores to it, in the universal, its function as subject.

99. See T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 165-67 (1983). In another formulation, "[o]nce the child has acquired language, however rudimentary it may be, then all the pre-verbal structures are radically altered to fit in with the language system. For Lacan, once the child has the capacity for language, there is a qualitative change in the psychical structure—he becomes a subject." B. BENVENUTO & R. KENNEDY, *supra* note 97, at 131 ("In Lacan's view, the father introduces the principle of law, in particular the law of the language system."). Given recent trends in the discipline, many developmental psychologists would find such statements embarrassingly "Piagetian." See, e.g., Gardner, Scherer & Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM.

imaginary order is thus replaced by the symbolic order, Lacan's term for "the pre-given structure of social and sexual roles and relations which make up the family and society."¹⁰⁰ With the passage into the symbolic, however, the child loses direct access to the imaginary possession of reality, and emerges into the restless world of language and repressed desire.¹⁰¹

The unconscious, for Lacan, is structured like a language—"a constant fading and evaporation of meaning, a bizarre 'modernist' text which is almost unreadable and which will certainly never yield up its final secrets to interpretation."¹⁰² The ego, or consciousness, represses the turbulence by

PSYCHOLOGIST 895, 898 (1989) (citations omitted) ("Adolescent cognitive development is not stage-like. [In the 1960s and early 1970s, Piaget and others] described cognitive development as a series of stages in which children's thought had a homogeneous logical structure across task domains. Recent cognitive development theory, however, has turned away from stage theories."). *But see* R. KEGAN, *THE EVOLVING SELF: PROBLEM AND PROCESS IN HUMAN DEVELOPMENT* 73-109 (1985) (defending, from an object-relations perspective, a neo-Piagetian scheme of child developmental stages, while acknowledging that the "stages" are overlapping and interrelated).

100. T. EAGLETON, *supra* note 99, at 167 Lacan posits the Symbolic, Imaginary and Real orders. J. LACAN, *supra* note 46, at 30-113. Benvenuto and Kennedy explain:

The Imaginary Order includes the field of phantasies and images. It evolves out of the [Prototypical] mirror stage, but extends into the adult subject's relationships with others.

The Symbolic Order is easier to grasp, being concerned with the function of symbols and symbolic systems, including social and cultural symbolism. Language belongs to the Symbolic Order, and in Lacan's view, it is through language that the subject can represent desires or feelings, and so it is through the Symbolic Order that the subject can be represented, or constituted. The Real Order, on the other hand, is the most elusive of these categories, and is linked to the dimensions of death and sexuality. Basically, it seems to be the domain outside the subject [I]t is what the subject keeps "bumping up against"

B. BENVENUTO & R. KENNEDY, *supra* note 97, at 81.

101. T. EAGLETON, *supra* note 99, at 167 Lacan writes:

This moment in which the mirror-stage comes to an end inaugurates the dialectic that will henceforth link the *I* to socially elaborated situations.

It is this moment that decisively tips the whole of human knowledge into mediatization through the desire of the other, constitutes its objects in an abstract equivalence by the co-operation of others, and turns the *I* into that apparatus for which every instinctual thrust constitutes a danger, even though it should correspond to a natural maturation—the very normalization of this maturation being henceforth dependent, in man, on a cultural mediation as exemplified, in the case of the sexual object, by the Oedipus complex.

J. LACAN, *supra* note 46, at 5-6 (emphasis in original).

Lacan draws on Piaget's work on the linguistic development of children—work that is nowadays viewed as dated by the dominant schools of psychology. *See, e.g.,* Gelman & Baillargeon, *A Review of Some Piagetian Concepts*, in 3 *HANDBOOK OF CHILD PSYCHOLOGY* 167-221 (P. Mussen ed. 1983) (questioning Piaget's broad stages of development, each characterized by qualitatively distinct structures).

102. T. EAGLETON, *supra* note 99, at 168-69.

[The psychoanalyst's] whole experience must find in speech alone its instrument, its context, its material, and even the background noise of its uncertainties.

[W]hat the psychoanalytic experience discovers in the unconscious is the

"provisionally nailing down words on to meanings," but articulation is always an approximation of truth. The "imaginary" reappears in the conscious and necessary attempt to view oneself as reasonably unified and coherent.¹⁰³ As analyst, Lacan adopts the Freudian emphasis upon dreams as a means of approaching the unconscious, but Lacan also examines, in Structuralist fashion, the analysand's speech and associations in general, as well as the breaks and irregularities in speech patterns.¹⁰⁴ Defense mechanisms parallel literary devices in the analysis of the language of the unconscious (or of the id, of desire), which interacts with the language of culture (ordinary speech).¹⁰⁵ Moreover, as a constructive theorist, Lacan proposes a radical new language of enjoyment and fantasy liberated from unhealthy repressions.¹⁰⁶

Several implications of Lacanian theory are apparent for radical social theory. First, Structuralism as a literary theory helps explain how a legal text, for example, might "intimidate us because we do not see how the language got there in the first place."¹⁰⁷ The power of such a text, with its hidden assumptions, lies in a suppression of its mode of production not unlike the ego's repression of its own self-constructive processes.¹⁰⁸ Second, Althusser's theory of ideology implicitly relies on Lacan in explaining how

whole structure of language. Thus the notion that the unconscious is merely the seat of the instincts will have to be rethought.

J. LACAN, *supra* note 46, at 147.

For a discussion of Lacan's complex reconception of Saussure's linguistic theory, set forth in J. LACAN, *supra* note 46, at 146-78 (essay entitled *The Agency of the Letter in the Unconscious or Reason Since Freud*), see B. BENVENUTO & R. KENNEDY, *supra* note 97, at 103-25, 217-22. See also Meltzer, *supra* note 28, at 158-60. For Saussure

a linguistic *sign* unites, not a thing and a name, but a concept [signified] and a sound-image [signifier]. Saussure claimed that meaning is generated by signifiers, not just in relation to their signifieds but also according to their position in the sentence in relation to other signifiers. So, too, Lacan will liken the unconscious to the movement of the signifier. [W]hat matters is the meaning generated by the position of the signifier, not the usual meaning (signified) associated with it.

Id. at 159 (emphasis in original). Using Saussure's terminology, the "unconscious is just a continual movement and activity of signifiers, whose signifieds are often inaccessible to us because they are *repressed*." T. EAGLETON, *supra* note 99, at 168 (emphasis in original). The "potentially endless movement from one signifier to another is what Lacan means by desire." *Id.* at 167.

103. T. EAGLETON, *supra* note 99, at 169; see also B. BENVENUTO & R. KENNEDY, *supra* note 97, at 56 ("The ego has the illusion of autonomy, but it is only an illusion, and the subject moves from fragmentation and insufficiency to illusory unity."); *id.* at 61 ("[T]he human subject will continue throughout life to look for an imaginary 'wholeness' and 'unity.'").

104. E. KURZWEIL, *supra* note 89, at 148.

105. *Id.* at 148-49.

106. *Id.* at 153.

107. T. EAGLETON, *supra* note 99, at 170.

108. *Id.*

we come to submit to dominant ideologies.¹⁰⁹ "We tend to see ourselves . as free, unified, autonomous, self-generating individuals; and unless we did so we would be incapable of playing our parts in social life."¹¹⁰ Nevertheless, we are in fact bound to the social structure that gives us purpose and identity through its signs and social practices.¹¹¹ Like Lacan's child with its mirror-image, the individual subject is supplied with an idealized image, a misrecognition, of autonomy and freedom.

VI. CRITICAL LEGAL STUDIES AND THE PSYCHOANALYTIC TRADITION

A. *Traces of Freud in CLS*

"I think how people get over neuroses is just incredibly mysterious. You're talking about it just like Freud, in which, you know, you just spin the wheel, and whatever slot the little ball drops into becomes *the truth*. Now we've got collective getting over neuroses."¹¹²

Explicit references to Freud appear now and then in CLS literature, but Freudian or near-Freudian terminology abounds. Peter Gabel, who employs

109. *Id.* (citing L. ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* (B. Brewster trans. 1971)); see *infra* notes 179-87 and accompanying text (discussing Althusser's theory of ideology). But see E. RAGLAND-SULLIVAN, *supra* note 96, at 272:

All ideological readings of Lacan miss the point. In the Marxist Louis Althusser's famous misreading of Lacan, the subject and the [exteriorized yet determinative Other] are equated so that the conscious subject is both master of Desire and of language.

110. T. EAGLETON, *supra* note 99, at 172.

111. *Id.* (Althusser's view). In Lacan's formulation:

Symbols in fact envelop the life of man in a network so total that they join together, before he comes into the world, those who are going to engender him 'by flesh and blood'; so total that they bring to his birth the shape of his destiny; so total that they give the words that will make him faithful or renegade, the law of the acts that will follow him right to the very place where he is not yet and even beyond his death.

J. LACAN, *supra* note 46, at 68 (emphasis in original) (footnote omitted) (quoting C. LÉVI-STRAUSS, *LES STRUCTURES ÉLÉMENTAIRES DE LA PARENTÉ* (1949)). Thus the subject, as "the slave of language is all the more so of a discourse in the universal movement in which his place is already inscribed at birth, if only by virtue of his proper name." *Id.* at 148. Frederic Jameson observes:

Lacan's attention to the components of language has centered on those kinds of words, primarily names and pronouns, on those slots which, like the shifters generally, anchor a free-floating syntax to a particular subject, those verbal joints, therefore, at which the insertion of the subject into the Symbolic is particularly detectable.

Jameson, *Imaginary and Symbolic in Lacan: Marxism, Psychoanalytic Criticism, and the Problem of the Subject*, in *LITERATURE AND PSYCHOANALYSIS*, *supra* note 18, at 362.

For a more conventional but similar description of socialization into an already-established family and then culture, see K. KAYE, *THE MENTAL AND SOCIAL LIFE OF BABIES: HOW PARENTS CREATE PERSONS* 202-21 (1982) (self-concept transmitted to infant through language, child accommodates to social system, self as product of membership in social system).

112. Gabel & Kennedy, *Roll Over Beethoven*, 36 *STAN. L. REV.* 1, 45 (1984) (emphasis in original) (Kennedy's response to Gabel) (transcript of a seminar).

a concept of false consciousness in his work, speaks of the "collective projection and internalization of an imaginary political authority" as the "mass-psychological foundation of democratic consent."¹¹³ Gabel has also, however, questioned the adequacy of Freud's theory of "an alienated ego resulting from the necessary renunciation of instinctual desires" and attempted to improve, by phenomenological description, both the Freudian and Marxian stories of alienation.¹¹⁴

David Trubek has characterized legal thought as "a form of denial, a way to deal with perceived contradictions that are too painful for us to hold in consciousness."¹¹⁵ Moreover, for Trubek, critical legal scholars are like Freudian analysts in bringing "to 'consciousness' what is hidden by hegemonic world views."¹¹⁶ Mark Kelman, likewise, identifies Freudian themes in the CLS emphases upon *unconscious* self-construction of reality and distortion of reality by avoidance or denial.¹¹⁷ James Boyle's article on the "politics of reason," in which he attempts to develop a sort of tool kit for the CLS project, remarks that Habermas' compelling "idea of belief structures that were once necessary to group survival but are now merely empty and repressive traditions has definite Freudian overtones."¹¹⁸ Finally, Thomas Heller, in his helpful study of Structuralism in critical legal thought, highlights the significance of Freudian images of post-therapeutic freedom

113. *Id.* at 29 (Gabel's response to Kennedy).

114. Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

In spite of the many modifications psychoanalytic theorists since Freud have made to his original formulations, only [Lacan and R.D. Laing] have produced theories that enrich the experiential texture of these formulations while retaining their full critical bite. [Lacan's] descriptions of how the child's desire is skewed by cultural conditioning is [sic] a phenomenological advance over the abstractness of Freud's account, but [his] insistence on the unintelligibility of desire leaves him as unable to capture what we are alienated *from* as Freud was. [R.D. Laing], who has written very good experiential studies of how alienation is mediated through the family, has never tried to develop a theory of social being comparable in scope to Freud's.

Id. at 1565 n.3 (emphasis in original) (citations omitted).

115. Trubek, *supra* note 3, at 607.

116. *Id.* at 608 (emphasis added).

117. Kelman, *supra* note 3, at 304. Kelman, however, is critical of Peter Gabel's "empty slogans":

He says things like "[t]he project is to realize the unalienated relatedness that is immanent within our alienated situation." But I see too few concrete references to lived experience in this "specification" to know if he is actually describing a blissful state-of-mind or a small household appliance. My mind goes utterly blank when I try to picture Peter's characters [for example, real legal actors behind juridical abstractions] glimpsing liberation by way of unalienated relatedness.

Id. at 343-44 (footnotes omitted) (quoting Gabel & Kennedy, *supra* note 112, at 1).

118. Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 702 n.49 (1985).

for Neo-Marxian Critical Theory, for the Structuralist tradition, and impliedly for CLS.¹¹⁹

Significantly, David Kennedy's recent study on the roles of Critical Theory and Structuralism in contemporary jurisprudence does not emphasize Marcuse's Freudianism at all, and barely acknowledges Lacan's work. This is neither wrong nor surprising, but rather confirms that the place of Freud in CLS is at present a series of suggestive traces. Not only is there no adoption of psychoanalysis, but no common understanding of Freud's significance for radical social theory emerges.

B. CLS and the Social Freud

"One of the most distinctive derivations from modern Marxism which characterizes critical legal theory has been the shift of focus from economic relations to the focus upon political and cultural relations. Central to this concern is ideology, conceived as a mechanism which forms the consciousness of agents."¹²⁰

CLS has taken many forms in the literature associated with the movement. Some choose to emphasize the implications of CLS for radical practice,¹²¹ and some appear anxious at times to move beyond (rather than digress further into) theoretical concerns.¹²² Other emphases include textual concerns and the contemporary debates regarding interpretation, especially of the United States Constitution,¹²³ the role of CLS in legal education,¹²⁴ and specific attacks on traditional or mainstream legal scholars.¹²⁵ One unifying theme in the CLS canon, however, is the concern with the ideological role of law in society—legal institutions and processes serve to legitimate hierarchies, to support hegemonic structures, to hide inequalities and oppression. I have argued, elsewhere,¹²⁶ that CLS is at its best when viewed as an ideology critique. Nevertheless, Alan Hunt points out that CLS betrays an unfounded assumption that the legal ideology of judges and lawyers is somehow "effective in constructing the perception and consciousness of the dominated in contemporary capitalist societies."¹²⁷

119. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 132-33, 158-59 (1984).

120. Hunt, *supra* note 1, at 11.

121. See, e.g., Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984).

122. See, e.g., Johnson, *supra* note 4, at 289-91.

123. See, e.g., Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984).

124. Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* 40 (D. Kairys ed. 1982).

125. See Hutchinson, Book Review, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 637 (1987) (reviewing R. DWORKIN, *LAW'S EMPIRE* (1986)).

126. Caudill, *Disclosing Tilt: A Partial Defense of Critical Legal Studies and a Comparative Introduction to the Philosophy of the Law-Idea*, 72 IOWA L. REV. 287 (1987).

127. Hunt, *supra* note 1, at 11.

How does legal ideology work to legitimate hierarchical structures? Anthony Chase investigates, and recommends further inquiry into, mass culture images of law and lawyers.¹²⁸ A more fundamental question persists, however, in the doubt expressed by some ideology critics as to whether a single invisible ideology exists at all.¹²⁹ One might conclude that CLS lacks both a theoretical foundation for its ideology critique and "an empirical demonstration of the connection between legal ideology and the formation of popular consciousness."¹³⁰ In the face of these questions, I believe we should reassess Freudian theory and its potential for social criticism.

Charles Lawrence¹³¹ considers several theories of racial inequality in his 1983 book review of David Kirp's *Just Schools: The Idea of Racial Equality in American Education*. Lawrence's exposition of ideology as an unconscious defense mechanism is particularly instructive. Using Freudian terms, Lawrence argues that individuals justify, rationalize or even deny uncomfortable realities—uncomfortable perhaps because of a conflict with what has been taught to them as morally acceptable behavior.¹³² "At the societal level, ideology assumes the role of the defense mechanism in the individual psyche."¹³³ While ideology can be viewed as the result of rational calculation of those in power, Lawrence prefers to view ideology as a symptom—a symbolic outlet for emotional disturbances.¹³⁴ The ideology of equal opportunity is developed by academics, judges, politicians and lawyers identified with the socioeconomic order but who feel the tension between that order and their ideals.¹³⁵ Lawrence wants to explain not only the illusion of equal treatment advanced by law—a CLS-like exercise—but also why legal scholars react by deluding themselves to avoid anxiety and fear.¹³⁶ "This self-mystification occurs on an unconscious level and results in selective perception."¹³⁷

Lawrence developed his views further in his 1987 article on equal protection, specifically the doctrine of discriminatory purpose.¹³⁸ In Lawrence's

128. See Chase, *Toward a Legal Theory of Popular Culture*, 1986 Wis. L. Rev. 527.

129. See D. McLELLAN, *supra* note 15, at 73; J. THOMPSON, *supra* note 16, at 5; see also Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 Wis. L. Rev. 81, 100.

130. Hunt, *supra* note 1, at 13.

131. Lawrence, Book Review, "Justice" or "Just Us": *Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983).

132. *Id.* at 841.

133. *Id.*

134. *Id.* at 842 (citing Geertz, *Ideology as a Cultural System*, in THE INTERPRETATION OF CULTURES 201-02 (1973)).

135. *Id.*

136. *Id.* at 843-48.

137. *Id.* at 848; see also R. KOENIGSBERG, THE PSYCHOANALYSIS OF RACISM, REVOLUTION AND NATIONALISM (1977).

138. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (reconsideration of discriminatory purpose doctrine in Washington v. Davis, 426 U.S. 229 (1976)).

analysis, unconscious racism can be explained by reference to the Freudian theory of repression of guilt and to socio-cognitive psychology's theory of tacit beliefs and preferences transmitted by culture.¹³⁹ "Whatever our preferred theoretical analysis, there is considerable commonsense evidence from our everyday experience to confirm that we all harbor prejudiced attitudes that are kept from our consciousness."¹⁴⁰ Lawrence extends his analysis by considering two constitutional theories justifying heightened equal protection scrutiny and then proposing and applying (hypothetically) a new "cultural meaning" test.¹⁴¹ He concludes that unconscious racism violates antidiscrimination law.

The analogy between the critique of ideology and psychoanalysis is also addressed by Raymond Geuss in his study of Habermas and Critical Theory.¹⁴² In *The Future of an Illusion*, Freud distinguished between error (false factual belief), delusion (false belief that satisfies a wish) and illusion (false or true belief that satisfies a wish).¹⁴³ Geuss refines the Freudian scheme toward a "wishful thinking" model of *Ideologiekritik*, which proceeds by identifying an illusion, or mistaken belief, and explaining it by reference to Habermas' "interests."¹⁴⁴ Geuss' framework enriches Freud's concepts because mistake may be caused by an institutional context and not just individual psychology.¹⁴⁵ This institutional context might cause agents to make mistakes, thereby serving the interests of others as, for example, when statisticians work under conditions that cause them to underestimate unemployment in the service of some powerful group. Such factual errors, however, are not ideological; thus ideologies might consist of those forms of consciousness with little or no observational content, such as attitudes, preferences and normative beliefs. How, then, can the critic label the agent's belief "false"? Geuss turns to Nietzsche's criticism of Christianity to suggest a critical possibility: Christianity (for Nietzsche) arises in hatred; a Christian can't accept hatred as a motive; Christianity requires that its adherents not recognize their motives; therefore a Christian who recognizes the hatred

139. *Id.* at 322-23. Thus the requirement of a racially discriminatory purpose to challenge a facially neutral law "ignores much of what we understand about how the human mind works." *Id.* at 323; see also *id.* at 329 ("The law has, for the most part, refused to acknowledge what we have learned about the unconscious.").

140. *Id.* at 339. Lawrence notes that his purpose is not "to defend psychoanalytic theory as the definitive description of psychological processes. Rather, I have drawn upon psychoanalytic theory because it provides a conceptual vocabulary for processes that we have all observed in our everyday lives." *Id.* at 331 n.55.

141. *Id.* at 344-81.

142. R. GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* (1981).

143. S. FREUD, *THE FUTURE OF AN ILLUSION*, *supra* note 30, at 47-53 (religious belief as an illusion in Freud's scheme).

144. R. GEUSS, *supra* note 142, at 41; see *id.* at 45 (containing a discussion of Habermas' theory of interests with citations to Habermas' own work).

145. *Id.* at 41.

implied by Christianity can rationally give up his or her belief. Whether Christianity is shown as "false" is not important—the point is that the enlightened agent's own standard of acceptability was sufficient for the critique.¹⁴⁶

The analogy with psychoanalysis is evident. For both Lawrence and Geuss, Freudian concepts illustrate how individuals might think and act contrary to personal morality (Lawrence) or interests (Geuss) because of a ruling ideology. In Lawrence's example, the ideology *is* the individual's repressive defense mechanism; in Geuss' example, ideology provides a desire or wish that is false by the individual's own standards.

If the above examples seem inspired by Critical Theory—Geuss by Habermas, and Lawrence, impliedly, by Marcuse ("repression from without has been supported by repression from within")¹⁴⁷—David Kennedy believes that Lacan's psychoanalytic practice is instructive for legal analysis.¹⁴⁸ While the Lacanian analysis is "neither critical nor constructive," the analyst and analysand venture into the symbolic, through and between conscious and unconscious codes, and "a constituting exchange . . . permits momentary glimpses of the totality . . ."¹⁴⁹ Thus, "Lacan's approach suggests the possibility for contextual insight within an awareness of ambiguous signs and unknowable origins."¹⁵⁰ The modesty is striking, but the theoretical promise, perhaps barely, avoids nihilism.

Peter Goodrich, a British scholar who participated in the first Round Table on Law and Semiotics,¹⁵¹ believes that

[l]egal education, the institutionalization of the future custodians of the law, is an exemplary object of analytical study in terms of the classical Freudian categories and languages of conscious and unconscious states, of the antinomy of the pleasure principle and the reality principle, in terms of desire and repression played out in the internalized form of parapraxis [e.g., a slip of the tongue], of transference, complex [e.g., of repressed desires], obligation and censorship.¹⁵²

Goodrich identifies two facets of the disciplinary tradition of law: the positive "idealizations present in and presented to the student of law," and the negative "processes of prohibition and censorship whereby the student

146. *Id.* at 42–44.

147. H. MARCUSE, *supra* note 5, at 16.

148. Kennedy, *supra* note 10, at 282 n.180.

149. *Id.*

150. *Id.*

151. The annual Round Table is held at Penn State-Berks (Reading), and is organized by Roberta Kevelson, the director of the Center for Semiotic Research in Law, Government and Economics. The papers from the first Round Table are published in 1 *LAW AND SEMIOTICS* (R. Kevelson ed. 1987).

152. Goodrich, *Psychoanalysis in Legal Education: Notes on the Violence of the Sign*, in *LAW AND SEMIOTICS*, *supra* note 151, at 200 (footnote omitted).

of law internalizes the limits of legal argument."¹⁵³ Enter psychoanalysis, which

as method, language and voice represents precisely that disordering or denial of unity and of control over meaning that law and doctrine exist to disallow, to cover over. Psychoanalysis speaks of and intermittently provides a text for that which is inadmissible, constrained or undisclosed in the liberal culture of the individual.¹⁵⁴

While the psychoanalytical account of legal education will face obstacles not unlike the analysand's defenses in clinical analysis,¹⁵⁵ we have a duty to speak out, despite how unbearable our voice to the institution, in "view of the irreducible damage that law does to our lives, in view of the absence of any limit to its encroachment upon the 'private sphere,' that sphere which appears to have no other function than that of providing a reference point, which is also a vanishing point ."¹⁵⁶ Goodrich's provisional exploration, which (informed by Freud as well as by Lacan, Kristeva, Foucault, Derrida and Irigaray) sees psychoanalysis as a "theory of interpretation and an epistemology of language," implicates law and legal doctrines and institutions generally. His concerns parallel those of CLS—hierarchical training in law schools, hidden discourses or structures of power in law, and the repression of alternatives.

The potential for Freud in CLS is not so much in "opening up new avenues of inquiry," but in explicating and thereby enriching the critique of ideology that is already implied in the CLS canon. In the search for the process or mechanism whereby legal ideology is confirmed or legitimated in society, the psychoanalytic tradition teaches that society introduces

into each individual its own ideological axes, which then become the generative kernels of emotions, attitudes and modes of relating to others

These axes are profoundly unconscious, entering into each of us through our early and most intense contacts with others who already bear the weight of ideology upon them.¹⁵⁷

153. *Id.* Legal "education provides irrefragable authorities, irrefutable norms, incontestable truths or it provides a surrogate father figure;" it also "imposes a canon of argument and of correct meanings [that] exclude and denigrate those discourses that are based upon emotive and non-centripetal categories of communicative competence" *Id.* at 200-01.

154. *Id.* at 195-96.

In raising the question of the manner in which the individual as subject is temporarily and psychically constructed analysis is led eventually to question an order of repression, of motives and of the unconscious, in which the laws governing the forms of discourse, of the possibilities of speech, are inscribed in the very constitution of subjectivity.

Id. at 196.

155. *Id.* at 197, 204.

156. *Id.* at 208; *id.* at 204 (citing Lacan) ("What is monstrous to the educational institution, to the scriveners of the codicils, is the advent of a rhetoric which writes differently, which collapses and inverts the authoritarian hierarchies inscribed in grammar itself").

157. S. FROSH, *supra* note 25, at 269.

C. Freudian Criticism of CLS

Robin West recently explored the relationship between legal liberalism and Freud's "understudied but provocative" notion of the Rule of Law.¹⁵⁸ West's exposition, however, also introduced an implied criticism of leftist legal scholarship based upon Freudian social and political theory.

Briefly, Freud identified a "problem of power" in civilization arising from the aggressive, antisocial instinctual desires of individuals that cannot be neutralized by the capacity for altruism, empathy or love.¹⁵⁹ The Rule of Law, for Freud, was history's solution to the problem, as illustrated by the story of the "father horde." Once the brothers of the horde killed the all-powerful father, their remorse led to collective obedience to the substitute father—the *totem*—and its commands, including a prohibition against killing the totem animal and each other.¹⁶⁰ The Rule of Law, West explains, originates for Freud in this state of artificial equality under the murder taboo.

The potential for eros, the love instinct, to hold civilization together is problematic for Freud (if not Marcuse). Not only does eros struggle against an equally powerful death instinct, but eros is itself ambivalent toward civilization. The fundamental erotic instinct is oriented to relationships between couples, not large social groups. "Protection for the communal unit," therefore, "must be found elsewhere."¹⁶¹

Institutionalized guilt, followed by "renunciatory obedience to a protective and impersonal authority," is, for Freud, the historical resolution reflected in both the father horde story and in modern civilization's Rule of Law.¹⁶² West argues that Freud's scheme is instructive for contemporary legal liberalism, as well as law and economics scholarship. Significantly for the present study, West then contrasts the Freudian conception of the Rule of Law with critical and feminist legal scholarship. While acknowledging the aggressive, antisocial element in humanity, the critical tradition challenges Freud's lack of confidence in "communitarian" drives to unify civilization.

Thus, to the Freudian and liberal promise that law can bring artificial equality and therefore freedom from the tyranny of unequal power, the feminist and critical scholars answer with their own promise that law at its best can bring an empathic and loving community and, with that, a release from the anguish of alienation and separateness.¹⁶³

158. West, *supra* note 8, at 818.

159. *Id.* at 822.

160. *Id.* at 823-24 (citing S. FREUD, *TOTEM AND TABOO* 184-85 (A. Brill trans. 1918)).

161. *Id.* at 834.

162. *Id.* at 835-36.

163. *Id.* at 860-61.

The depersonalized Rule of Law, based upon a fear of love, is for the critics "an obstacle to the encouragement of intersubjective unity."¹⁶⁴

West finds a response to critical scholarship in the early pages of *Civilization and Its Discontents*, where Freud confesses he can find no feeling of "oceanic oneness" in himself.¹⁶⁵ The well-demarcated boundary between self and the world—rejected by critical scholars—is fundamental for Freudian psychology. While romantic love between two individuals "melts away" the boundary between ego and object, universal love—indifferent to reciprocity—disproves any notion of "oceanic" union. Freud attributes the "oceanic feeling" to infantile memories wherein the ego is not yet distinguished from the world. By contrast, the totemic impulse is based upon the "capacity for obedience and the memory of helplessness"; the affection binding social groups together is for the leader, not one another.¹⁶⁶

West concludes the study by praising Freud's naturalistic method and chides legal liberals for choosing the "path of faith" over the "path of reason." At the same time, West concedes that Freud's description of our nature and history "may well be false." West's point is that legal theorists should defend the authority of law "by reference to naturalistic, and therefore falsifiable, assumptions," to "fact instead of faith."¹⁶⁷

Such confidence, of course, is at odds with the critical theory that West contrasts with orthodox Freudianism. West clearly identifies the reason why Freud's own theories about law are not compelling at all to the critical and feminist scholars. Not only are Freud's naturalistic assumptions questionable, but the very scientific method West praises is not properly contrasted with faith. For those in the critical tradition, the element of belief is present in all of science, and every scientific enterprise is ideological to the core.¹⁶⁸

West's exposition also demonstrates that CLS will likely draw its Freudianism from Marcuse or Lacan and not from the "scientific" Freud. Sufficient doubt has been raised concerning the positivistic value of Freud's writings,¹⁶⁹ and even Marcuse, in his attack of Freudian revisionism, prized Freud's anthropological speculation for its symbolic value.

164. *Id.* at 863.

165. *Id.* at 865 (citing S. FREUD, *CIVILIZATION AND ITS DISCONTENTS*, *supra* note 30, at 11).

166. *Id.* at 866-68 (citing S. FREUD, *CIVILIZATION AND ITS DISCONTENTS*, *supra* note 30, at 12-19).

167. *Id.* at 881.

168. See, e.g., Freeman & Mensch, *Religion as Science/Science as Religion: Constitutional Law and the Fundamentalist Challenge*, 2 *TIKKUN* 69 (Nov./Dec. 1987) ("[S]cientific methodology cannot claim any objective, transcendent separation from social and political life. Science is rooted in the culture within which it operates, and its underlying presuppositions are always a part of that social context.").

169. See S. FROSH, *supra* note 25, at 6-9 (summary of scientific criticisms of Freud). For two sympathetic accounts of the "scientificity" of contemporary psychoanalysis, see generally Eagle, *The Epistemological Status of Psychoanalysis*, 56 *SOC. RES.* 383 (1989); and Holland, *Scientificity and Psychoanalysis: Insights from the Controversial Discussions*, 17 *INT'L REV.*

VII. DEFINING AND OVERCOMING IDEOLOGY

"As is well known, the accusation of being in ideology only applies to others, never to oneself" ¹⁷⁰

Critical Legal Studies is itself the subject of criticism—that CLS is not new, that its critique is useless or non-empirical, and so forth. Again, even if conceived as a useful and liberating critique of ideology, CLS inherits two problems which plague similar social theories. First, what *is* ideology?¹⁷¹ And second, if it exists as an inevitable perceptual grid or linguistic power structure, how does the critic overcome its effect on his or her own critique?¹⁷²

The implicit role of psychoanalytic theory within CLS begins to answer these questions. In this section, I first return to Lacan in order to explore Althusser's commentary (which analogizes the unconscious and ideology) and Peter Gabel's psychoanalytic critique of legal culture (which is inspired by Lacanian concepts). A definition of ideology emerges that can also serve to define legal ideology. Next, I consider Habermas' early commentary on Freud, which emphasized the self-reflective element in psychoanalysis, keeping in mind that Habermas has substantially altered his theoretical concerns. Finally, I attempt to describe a tentative agenda for radical socio-legal psychoanalysis.

A. Lacan (and Althusser)

"Lacan made a very successful career out of saying things that just about no one could understand. He seems to have gone to great lengths to prevent people from finding out what he had to say."¹⁷³

PSYCHO-ANALYSIS 133 (1990). Eagle argues:

What is known as psychoanalytic theory is a rather heterogeneous, loosely constructed set of formulations [that] range from ones that can reasonably be subjected to empirical test, at least in theory, to those that are quite unsusceptible to empirical evaluation. Hence, any sweeping unqualified statements—such as "Psychoanalysis is a science" or "Psychoanalysis is not a science"—are likely to be inaccurate and incomplete.

Eagle, *supra*, at 386.

Holland argues that Freud's functionalistic, or positivist, perspective was the first of three "contradictory and distorted" paradigms inhabited by Freud (the others designated as the "interpretive" and the "radical humanist"): "All of them wrong and incomplete, but all that he had, and so much more than anybody has enjoyed before or after him." Holland, *supra*, at 142.

170. L. ALTHUSSER, *supra* note 109, at 175.

171. See *supra* notes 11-19 and accompanying text.

172. That is, "How did [CLS writers'] souls survive uncorrupted?" Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 446 (1984).

173. S. SCHNEIDERMAN, JACQUES LACAN: THE DEATH OF AN INTELLECTUAL HERO vi (1983).

Lacanian clinical analysis, which seeks verbalization of the patient's unconscious,¹⁷⁴ is an attempt to escape "normal" (or civil, coherent and rational) communication between analyst and analysand, and thereby "to discover another logic."¹⁷⁵ The controversial "short session" (Lacan's repudiation of the traditional "fifty minute hour") serves to keep the analysand off balance—"the analysand [does] not have time to get his bearings, to establish his sense of being in control of the situation, to get his thoughts in order."¹⁷⁶ In Freudian terms, the short session, which may last only a couple of minutes, frustrates the ego's censorship and explanatory functions:

Almost by definition, the ego can never be the master of the short session.

This ego, however, asserts itself with a vengeance, not only in trying to control the situation but in offering interpretations. This mode of interpretation is eventually revealed to be the system that holds the neurosis in place.¹⁷⁷

The analyst, in this conception, ignores the intentions of the ego, and "hears the discourse of the other, the unconscious that slides through the gaps in intentionality."¹⁷⁸

Louis Althusser's reliance upon Freud (and commentary upon Lacan) is particularly relevant to the question of the place of psychoanalysis in CLS's critique of ideology. Marx's early conception of ideology as "the system of the ideas and representations which dominate the mind of a man or a social group" is later formulated (in *The German Ideology*) in a "plainly positivistic context".

Ideology is conceived as a pure illusion, a pure dream, i.e. as nothingness. All its reality is external to it. Ideology is thus thought as an

174. *Id.* at 57. "All the analyst can do is offer to the patient access to speech. This speech, being described as free association, is not centered on a particular subject; the only subject the analyst recognizes is the subject of the unconscious." *Id.* at 116.

For Lacan, language is "the precondition of the unconscious, and speech is the instrument of cure." Schneiderman, *The Most Controversial Freudian Since Freud*, *PSYCHOLOGY TODAY*, Apr. 1978, at 56.

175. S. SCHNEIDERMAN, *supra* note 173, at 118. Lacan "felt that analysis should offer another structure, a structure that was not identical with that of everyday life." *Id.* at 143.

176. *Id.* at 151. "Lacan must have felt that talking too much often was used as a resistance to avoiding the issues." *Id.* at 138.

177. *Id.* at 134. Bringing a neurotic condition into consciousness "does produce some changes in the attitude of the neurotic toward his neurosis, but it does not alter the structure in any fundamental way." *Id.*

178. *Id.* According to another commentator, Lacan acknowledged Freud's discovery that truth manifests itself in the letter rather than the spirit, that is, in the way things are actually said rather than in the intended meaning. The psychoanalyst learns to listen not so much to her patient's main point as to odd marginal moments, slips of the tongue, unintended disclosures.

J. GALLOP, *READING LACAN* 22 (1985); cf. *supra* note 111, at 338 (Frederic Jameson's remark) (language "constitutes that primary social instance into which the pre-verbal, pre-social facts of archaic or unconscious experience find themselves somehow inserted").

imaginary construction whose status is exactly like the theoretical status of the dream among writers before Freud. For these writers, the dream was the purely imaginary . . . ¹⁷⁹

Althusser's own view of ideology, as the "representation" of the imaginary relationship of individuals to their real conditions of existence," confirms the material existence of ideologies.¹⁸⁰ However, ideology is eternal, as "individuals are always-already interpellated [hailed, recruited or transformed] by ideology as subjects."¹⁸¹ Althusser draws support for his thesis from Freud's discovery of the familial ideological configuration into which we are born.¹⁸² This

configuration is, in its uniqueness, highly structured, and . . . it is in this implacable and more or less 'pathological' . . . structure that the [child] will have to 'find' 'its' place It is clear that this ideological constraint and pre-appointment, and all the rituals of rearing and then education in the family, have some relationship with what Freud studied in the forms of the pre-genital and genital "stages" of sexuality, i.e. in the "grip" of what Freud registered by its effects as being the unconscious.¹⁸³

In this way, the eternity of ideology is related to Freud's eternal unconscious.¹⁸⁴

179. L. ALTHUSSER, *supra* note 109, at 159. "In fact, *The German Ideology* does offer us an explicit theory of ideology, but it is not Marxist" *Id.* at 158.

180. *Id.* at 162. Althusser wants to adopt Marx's conception of ideology while avoiding its positivism. Jameson refers to Althusser's definition of ideology—inspired by Lacan—as the "first new and as yet insufficiently developed conception of the nature of ideology since Marx and Nietzsche" Jameson, *supra* note 111, at 393-94. Ideological representation must "be seen as that indispensable mapping fantasy or narrative by which the individual subject invents a 'lived' relationship with collective systems which otherwise by definition exclude him insofar as he or she is born into a pre-existent social form and its pre-existent language." *Id.* at 394. For recent criticism of Althusser, see Smith, *Ideology and Interpretation: The Case of Althusser*, 10 *POETICS TODAY* 493, 499-500 (1989) (Althusser "risks substituting one form of [Marxian] determinism for another, linguistic for economic"; moreover, Althusser's post-modernist tendencies lead to nihilism); Nielsen, *The Concept of Ideology: Some Marxist and Non-Marxist Conceptualizations*, 2 *RETHINKING MARXISM*, Winter 1989, at 146, 157-61; and P. RICOEUR, *LECTURES ON IDEOLOGY AND UTOPIA* 103-58 (G. Taylor ed. 1986).

181. L. ALTHUSSER, *supra* note 109, at 176.

182. *Id.*

183. *Id.*, see also R. LAING, *THE POLITICS OF THE FAMILY AND OTHER ESSAYS* 3-19 (1971). Note, however, that R.D. Laing's theory of the "divided self" is to be distinguished from, and indeed is opposed to, Lacan's topology of the psyche. See E. RAGLAND-SULLIVAN, *supra* note 96, at 62:

Laing (following Winnicott) makes a Rousseauesque division between true and false images of self ("true" belonging to the natural and good inner self and "false" to the distorting, repressive effects of the social realm). Lacan's subject, on the other hand, is a paradox of true and false. No final separation exists, therefore, between the inside and outside realms.

For a more conventional treatment of the familial configuration, from the perspective of family, therapy and its basis in systems theory, see Minuchin, *Families and Individual Development: Provocations from the Field of Family Therapy*, 56 *CHILD DEV.* 289 (1985).

184. L. ALTHUSSER, *supra* note 109, at 161 (emphasis in original) ("ideology is eternal, exactly like the unconscious").

Althusser recognizes Lacan's "return to Freud" as an attempt to define rigorously the unconscious and its laws.¹⁸⁵ Recall Lacan's statement that the unconscious is structured like a language. Aided by structural linguistics, Lacan discovered that the transition from birth into human existence "can only be grasped in terms of a recurrent language [of the cure situation] . . . localized within the law of language in which is established and presented all human order, i.e. every human role."¹⁸⁶ This transition is achieved within the "Law of Culture" (Althusser's term), the determinate ideological formations that have "been lying in wait for each infant born since before his birth, [seizing] him before his first cry, assigning to him his place and role, and hence his fixed destination."¹⁸⁷

B. Gabel

"[For Lacan,] psychoanalysis is based on a fundamental split between the subject and the knowledge he has of himself. Psychoanalysis deals particularly with wishes and desires that are unknown to the subject, and appear only in the unconscious."¹⁸⁸

Peter Gabel, whose work is associated with CLS scholarship, clearly employs psychoanalytic language and concepts. One of his most recent essays focuses on the social and intersubjective nature of desire, and the need for those involved in progressive politics to understand the desire for social confirmation. Reagan's economic and social agenda, as well as President Bush's campaign, were responsive to human needs for community and solidarity.¹⁸⁹ In contrast, the job and benefit programs of today's Democrats may be "experienced as psychologically repressive to the degree that . . . people's emotional context—their sense of unconnectedness and underconfirmation—[is treated] as fixed and inevitable."¹⁹⁰ Both political parties appear to avoid confronting—by offering only "fantasies" or "programs"—"the real alienation and blockage of social desire that is our most serious problem as a people."¹⁹¹

185. *Id.* at 199-201.

186. *Id.* at 209.

187. *Id.* at 211; see also *id.* at 211 n.4 (defining "Law of Culture").

188. B. BENVENUTO & R. KENNEDY, *supra* note 97, at 18.

189. Gabel, *Dukakis's Defeat and the Transformative Possibilities of Legal Culture*, 4 *TIKKUN* 14 (Mar./Apr. 1989) [hereinafter Gabel, *Dukakis's Defeat*] ("Although the moral vision of the conservatives has been to a large degree imaginary . . . the right's symbolic discourse has recognized the centrality of social desire to politics and has offered at least compensatory fantasies to alleviate, at the intrapsychic level, the alienation of everyday life."). For a similar analysis of the jurisprudence of original intention as an imaginary psychopolitical account of our connection to one another, see Gabel, *Founding Father Knows Best: A Response to Tushnet*, 1 *TIKKUN* 41 (Mar./Apr. 1986), reprinted in 36 *BUFFALO L. REV.* 227 (1987).

190. Gabel, *Dukakis's Defeat*, *supra* note 189, at 14.

191. *Id.* at 15.

"Desire" is nowadays associated with the instinctual forces of the id that must be controlled.¹⁹² Such a model results in the separation of desire from knowledge (as in "dispassionate" social science), and in the "individualization" and "privatization" of desire.¹⁹³ The desire for mutual recognition that we experience and perceive in others

is resisted and even opposed by those around us who have learned . . . to deny this desire in themselves. The medium of this opposition is well-captured by what . . . Lacan called "misrecognition," a process by which the parent, instead of confirming the infant in his or her being, "throws" the infant and later the child into a series of roles that . . . alienate the child . . . from the centered desire that is the social dimension of the child's soul.¹⁹⁴

The split between the child's desire and his or her social self will be reproduced in others through familial and social contacts; moreover, the desire may be repeatedly repressed in an effort to maintain the validity of the internalized role.¹⁹⁵

192. *Id.*

193. *Id.* at 15-16.

194. *Id.* at 16. For a similar analysis of childhood culminating in the divided self, see R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* 151-65 (1984). Jameson described the Lacanian "Unconscious"

as that reality of the subject which has been alienated and repressed through the very process by which, in receiving a name, it is transformed into a representation of itself.

This production of the Unconscious by way of a primary repression which is none other than the acquisition of language is then reinterpreted in terms of the communicational situation as a whole . . . [A] distinct dimension of [the above-mentioned linguistic alienation is] the inescapable mediation of other people, and more particularly of the Other . . . or in other words the parents: yet here the Law represented by the parents, and in particular by the father, passes over into the very nature of language itself, which the child receives from the outside and which speaks [to] him just as surely as he learns to speak it.

Jameson, *supra* note 111, at 363-64.

195. Gabel, *Dukakis's Defeat*, *supra* note 189, at 16. Robin West's recent attack upon Gabel's psychoanalytic account as "deeply gendered" must here be acknowledged. See West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 45 (1988). Feminist scholars have convincingly identified the male perspective in contemporary jurisprudence. See, e.g., O'Donovan, *Engendering Justice: Women's Perspectives and the Rule of Law*, 39 U. TORONTO L.J. 127, 131 (1989) (citing C. Dalton, Remarks on Personhood (Jan. 5, 1985) (paper presented at AALS panel)) (Rawls' theoretical construct—the person who chooses civil libertarianism—"represents the caricature of a 'male' personality type"); Lahey, "Until Women Themselves Have Told All That They Have to Tell . . .", 23 OSGOODE HALL L.J. 519, 526 (1985) (emphasis in original) ("[T]he male perspective has its own point of view, and feminists object to treating the male point of view as a universal point of view."). West argues that all modern legal theory—"liberal legalism" as well as "critical legal theory"—"is essentially and irretrievably masculine" by virtue of a shared "separation thesis." West, *supra*, at 2.

Liberal legalists, in short, describe an inner life enlivened by freedom and autonomy from the separate other, and threatened by the danger of annihilation by him. Critical legal theorists, by contrast, tell a story of inner lives dominated by feelings of alienation and isolation from the separate other, and enlivened by

While the parent-child relationship may be the first locus for alienation, the distance between our desire and our social selves is maintained in schools and workplaces, through the media and in the various social structures that make up the apparently "given" world.¹⁹⁶ At the same time, the "blockage" is maintained by the individual's reciprocal projection of an "outside" world and deference—"in a milieu of misrecognition and collective denial"—to an external agency to ground his or her identity.¹⁹⁷ For Gabel, the circle of underconfirmation is not a problem for clinical psychoanalysis, but is rather a political problem requiring a gradual increase in *public* confidence.¹⁹⁸

the possibility of association and community with him. Each story constitutes a legitimate and true part of the total subjective experience of masculinity.

Id. at 5. Women, on the other hand, are not essentially separate, and are distinctively "connected" to one another in the experiences of pregnancy, heterosexual penetration, menstruation and breast feeding. *Id.* at 2-3; *see also id.* at 14 ("Women are actually or potentially materially connected to other human life. Men aren't.").

While women experience, West explains, fear of the unnatural state of separation, it is not the same dread of natural, male alienation identified in the CLS canon. *Id.* at 40-41. Thus Gabel's story "of attachment, separation, longing, rejection, repression, humiliation and then alienation is a story of male development, not female." *Id.* at 45. West is eventually constructive: "Gabel has confused his male experience of separation and alienation with 'human' experience because women have not made clear that our day-to-day, lived experience is incommensurable with men's. We need to flood the market with our own stories." *Id.* at 65.

196. Gabel, *Dukakis's Defeat*, *supra* note 189, at 106 ("These circular or 'rotating' processes of denial in which each person passes the same doubt on to the next person (or often to millions of people at once, as in the case of the newscaster) also account for the phantom phenomena we usually refer to as 'social structures.'").

197. *Id.* at 106-07.

198. *Id.* at 107. Gabel's work parallels the approach of Michael Lerner (editor of *Tikkun*; Gabel is a frequent contributor to, and associate editor of, *Tikkun*). *See* M. LERNER, *SURPLUS POWERLESSNESS: THE PSYCHODYNAMICS OF EVERYDAY LIFE AND THE PSYCHOLOGY OF INDIVIDUAL AND SOCIAL TRANSFORMATION* x-xi (1986) (Lerner acknowledges that his ideas were refined through discussions with Gabel). Gabel's recognition of the need for public confidence appears to reflect Lerner's conception of "Surplus Powerlessness": "[T]he set of feelings and beliefs that make people think of themselves as even more powerless than the actual power situation requires, and then leads them to act in ways that actually confirm them in their powerlessness." *Id.* at ii. Surplus Powerlessness "is the new form by which people are kept enslaved. It is inside our own heads, and it is recreated by us in every thought that assumes that how things are is the equivalent of 'reality.'" *Id.* at 4-5. In addition to *conscious*, misguided assessments of power, Surplus Powerlessness functions most effectively through a Social Unconscious: "shared meanings that most people assume in their daily interactions with others of which they are not aware and which they would resist knowing should they be pointed out." *Id.* at 12. However, and precisely "because denial of our fundamental human needs hurts so much, there is continual hope that we will break through our isolation and connect with each other in a deeper way and find ways to change the larger situation." *Id.* at 16. Significantly, Lerner sees the summary dismissal of religious insights by the Marxian and psychoanalytic traditions as a serious mistake: "As an alternative, the religious worldview helps to challenge the dominant society's attempt to frame reality as 'that which is' at the moment. The religious worldview opens up the social, intellectual and emotional space to

Legal culture, which provides a particularly visible example of mediation between local ("concrete") conflicts or needs and the national or universal (the larger "we") context, tends to reinforce the collective denial identified by Gabel.¹⁹⁹ Lawyers and judges, and legal reasoning itself, are "disembodied" and elevated in our society: "[Law] is made to appear as an authoritative system of thought outside of and above everyone . . . rather than as a contingent and developing expression of social and political meaning that we actively create and interpret."²⁰⁰ Legal discourse is thus an embodiment of the dynamic projection of underconfirmed subjects of an externalized source of social authority.²⁰¹

Gabel concludes his analysis by suggesting that progressive lawyers reconstitute legal culture by systematically challenging "the modes of role-based, disembodied interaction" in everyday life, and thereby begin to affirm social desire.²⁰² Public interest lawyers have too often accepted, Gabel explains, "the confines and assumptions of existing legal discourse and roles," thus relegating their own political and moral aspirations to their "private" lives.²⁰³ The transformative dimension of progressive legal practice will continue to be neutralized unless this ideological contradiction is recognized.²⁰⁴

C. Habermas

Habermas' reflections on psychoanalysis, published in *Knowledge and Human Interests*, now belong to history—to the "early Habermas."²⁰⁵ The

imagine a quite different way of approaching reality." *Id.* at 265.

In a recent book, Unger attempts to critique and restate the Christian-romantic view of human identity. See R. UNGER, *supra* note 194. Unger there identified "two connected tasks: the development of a psychology of empowerment and the analysis of the social conditions on which empowerment depends." *Id.* at 72. While we are mentally and socially structured by "institutional or imaginative assumptions" taken as given, we can break through and revise, or invent new, formative contexts." *Id.* at 7-8. For example,

we are empowered by freeing our understanding of society from superstition.

The characteristic form of superstition about society is the superstition of false necessity: the ease with which we mistake the constraints imposed by a particular formative context of social life for the inherent psychological, organizational, and economic imperatives of society.

Id. at 14.

199. Gabel, *Dukakis's Defeat*, *supra* note 189, at 107-08.

200. *Id.* at 108. The judge's platform and robe, and the attorney's "glassy-eyed, disembodied power-discourse in spite of the strain required to keep it up," serve to alienate citizens "from the political community that the lawyer or judge is supposed to represent." *Id.*

201. *Id.* at 109 ("the categories of legal discourse form a perceptual grid that is experienced by most people as 'the way things are'"); see also Gabel, *A Critical Anatomy of the Legal Opinion*, V ALSA FORUM 5, 10 (Fall 1980) ("[T]he social function of law is not to be found in its direct effect on socio-economic activity, but rather in its effect on people's minds.').

202. Gabel, *Dukakis's Defeat*, *supra* note 189, at 110-11.

203. *Id.* at 110.

204. See *id.* at 111.

205. See Bernstein, *Introduction to HABERMAS AND MODERNITY* 12 (R. Bernstein ed. 1985)

theoretical exposition in *Knowledge and Human Interests* has been recognized as flawed, even by Habermas, yet the essays on psychoanalysis are significant for the problems introduced if not the solutions offered.²⁰⁶ The fact is that Habermas' early work left much to be clarified and justified.

In 1968 Habermas viewed psychoanalysis as "the only tangible example of a science incorporating methodical self-reflection," even though Freud himself misunderstood the scientific aspect of the discipline he discovered.²⁰⁷ Psychoanalysis thus represented a new version of cultural interpretation directed not at the conscious intentions of language, but at the "*self-deceptions of the author* . . . inaccessible to him and alienated from him and yet [his] nevertheless."²⁰⁸ The mistakes in the text of everyday language (or action or bodily expression), normally ignored (or so obtrusive to be called symptoms) and, in any case, incomprehensible to the speaker, are

("Habermas soon came to realize that the systematic program sketched in *Knowledge and Human Interests* was seriously flawed . . . In [*The Theory of Communicative Action*], and in the writings leading up to it, one can discern a new systematic synthesis—which preserves Habermas's earlier insights, corrects its inadequacies, and points to new directions for research.").

206. Bernstein, *supra* note 205, identifies four major flaws in Habermas' theory. First, there "is a radical ambiguity in the basic concepts of reflection and self-reflection[;]" Habermas failed to distinguish between Kantian "self-reflection of reason upon the conditions of its employment" and the emancipatory self-reflection "that aims at freeing a subject 'from ideological frozen forms of dependence that can in principle be transformed.'" *Id.* at 12 (quoting Kant's *Critique*); see also *infra* note 220 and accompanying text. The second major flaw involves a failure to show "how we can at once justify the claim that there are unavoidable necessary universal conditions of communicative action and rationality, and maintain that these can be discovered and warranted in a scientific manner." Bernstein, *supra* note 205, at 13. Thirdly, Habermas obscured "the intrinsic intersubjective and dialogical character of communicative action." *Id.* at 14. Finally, no critical social science was systematically articulated. *Id.* at 14-15. Bernstein argues that Habermas' recent work substantially addresses these four shortcomings.

With respect to Habermas' retreat from Critical Theory's synthesis of Freud and Marx, see Whitebook, *Reason and Happiness: Some Psychoanalytic Themes in Critical Theory*, in HABERMAS AND MODERNITY, *supra* note 205, at 140-60 (Adorno and Marcuse as id-psychologists). See also LaCapra, *supra* note 23, at 249 (Habermas' ego-psychological perspective) (citing M. JAY, MARXISM AND TOTALITY: THE ADVENTURES OF A CONCEPT FROM LUKACS TO HABERMAS 480-81 (1984)) (discussing Habermas).

[W]hereas the patient and analyst shared an a priori interest in relieving the patient's neurotic symptoms, in society no such consensus could be assumed. Indeed, insofar as certain men or classes benefited from the maintenance of ideological distortion and exploitative power relations, there was no reason to assume they would willingly enter the process of dialogic enlightenment suggested by the psychoanalytic model. Nor would their improved understanding of reality necessarily generate a desire to transform it.

La Capra, *supra* note 23, at 249.

207. Habermas, *Self-Reflection as Science: Freud's Psychoanalytic Critique of Meaning*, in J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 214 (J. Shapiro trans. 1971) (first published in 1968).

208. *Id.* at 218 (emphasis in original).

"split-off" parts of a symbolic structure, another language.²⁰⁹ The dream provides the pathological model of such a text for Freud, and dream interpretation also illustrates the defense mechanisms so central to psychoanalysis: "The transformation of the latent dream-thoughts into the manifest dream-content . . . is the first instance known to us of psychical material being changed over from one mode of expression to another . . ."²¹⁰ Freud identified, in the systematic distortion of latent, symbolic "dream-thoughts" in the manifest dream, a restricting agency that even controls everyday thought and action.²¹¹ The defensive or "censorship" agency, representing social repression, is in conflict with unconscious wishes or motivations, and distorts the meaning of ("displacement") or eradicates the offensive passages of the text of the unconscious.²¹²

The "object domain" of psychoanalysis is the field of incomprehensible symbols which disrupt everyday language.²¹³ Significantly, the project is not akin to translation of a text to mediate between people with different languages, but is rather an effort to teach a person to comprehend his or her own self-mutilated language.²¹⁴ The act of understanding is self-consciousness or self-reflection, as exemplified in Freud's analytic technique.²¹⁵ When the patient's defensive mechanisms "run idl[y]"²¹⁶ in the analytic

209. Habermas, *Peirce's Logic of Inquiry: The Dilemma of a Scholastic Realism Restored by the Logic of Language*, in J. HABERMAS, *supra* note 207, at 110-11; see C. ALFORD, NARCISSISM: SOCRATES, THE FRANKFURT SCHOOL, AND PSYCHOANALYTIC THEORY 166 (1988):

In key respects Habermas's view of psychoanalysis resembles that of Lacan. Both see it as hermeneutics.

Yet the views of Lacan and Habermas are hardly identical. For Habermas, the goal of analysis is the reestablishment of the autonomous individual on a new basis. For Lacan, the goal is to show that the very idea of rational individuality is a veil

210. Freud, *On Dreams*, in 5 COMPLETE PSYCHOLOGICAL WORKS, *supra* note 67, at 642. Habermas explained that three "layers" appear in dream interpretation, namely the patient's rationalized elaboration, the manifest dream comprised of the "day's residues" and the "depth layer with the symbolic contents that resist the work of interpretation." J. HABERMAS, *supra* note 207, at 221.

211. See Freud, *New Introductory Lectures on Psycho-Analysis*, in 22 COMPLETE PSYCHOLOGICAL WORKS, *supra* note 67, at 14. The censorship (or repression) of unconscious motives is "slackened" in sleep and the motives thereby find a language. J. HABERMAS, *supra* note 207, at 224 ("The text of the dream can be conceived as a compromise between a substitute social censorship contained in the self and unconscious motives [U]nder the exceptional conditions of sleep, unconscious motives push forward into the material of the preconscious, which can be publicly communicated").

212. J. HABERMAS, *supra* note 207, at 223-24.

213. *Id.* at 226.

214. *Id.*

215. *Id.* at 228. Note that for Freud the patient does not suffer from ignorance, but from *resistances* which cause and maintain this ignorance. Freud, "Wild" Psycho-Analysis, in 11 COMPLETE PSYCHOLOGICAL WORKS, *supra* note 67, at 225.

216. J. HABERMAS, *supra* note 207, at 232.

situation, the ego recognizes "itself in its other . . . as *its own* alienated *self* and [identifies] with it."²¹⁷

Habermas, in the custom of earlier critical theorists seeking a Freud-Marxian synthesis, saw structural parallels between the individual psyche and contemporary culture. Collective solutions to the pressures of reality, represented by various institutions of social organization, seemed to resemble individual neurotic "solutions."²¹⁸ Cultural tradition was understood as the collective unconscious.²¹⁹ And, just as self-reflection in the analytic situation liberates a patient from falsifications and self-deceptions, the critique of ideology sets off a process of reflection upon and discourse concerning the collective illusion of "frozen relations of dependence that can in principle be transformed."²²⁰

D. Contours of a Psychoanalytic Critique of Legal Ideology

"Lacan shifts the Freudian paradigm from intrapsychic mechanisms to intersubjective relations, and from quasi-biological instincts to language, partially opening psychoanalysis to cultural theory."²²¹

Before attempting a summation and outline for the psychoanalytic criticism of legal culture, I should acknowledge again the limited scope of my inquiry. Lacanian theory is much richer in scope and potential than my remarks suggest, Althusser's work on ideology is likewise quite substantial and complex, and Habermas' ever-developing social theory is a major topic in many disciplines. Moreover, I have not explored the work of many other scholars who integrate psychoanalysis and ideology critique, for example, Foucault's disclosure of strategies of power within discourse,²²² and Deleuze and Guattari's work on the Oedipus Complex.²²³ The suggestive remarks that follow, therefore, are but further "traces" of the potential for psychoanalytic concepts in critical legal research.

Keeping in mind the revisionistic parallel between the topology of the individual psyche and that of culture, I will focus below on the concepts

217. *Id.* at 235-36 (emphasis in original); see also *id.* at 242 ("Freud conceived the defensive process as the reversal of reflection . . . analogous to flight, through which the ego conceals itself from itself.").

218. Habermas, *Psychoanalysis and Social Theory: Nietzsche's Reduction of Cognitive Interests*, in J. HABERMAS, *supra* note 207, at 276 ("Like the repetition compulsion from within, institutional compulsion from without brings about a relatively rigid reproduction of uniform behavior that is removed from criticism . . .").

219. *Id.* at 282.

220. Habermas, *Knowledge and Human Interests: A General Perspective*, in J. HABERMAS, *supra* note 207, at 310.

221. J. BRENNMAN, *CULTURE AND DOMINATION* x (1987).

222. See, e.g., M. FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES* (1970).

223. See G. DELEUZE & F. GUATTARI, *ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA* (1977).

of socialized *roles*, collective *desire*, and *self-criticism* as essential elements of the critique of ideology. Each involves a glimmer of liberation, the elusive goal of radical social theory.

1. Roles

Freud's interpretation of childhood teaches that "the organization of everyday life by the social institution of the restricted family [leaves] a clear imprint on the course of [the] childhood experience" ²²⁴ However, Freud tended to view the child's psyche as a primary function and the social environment as a secondary influence. By contrast, as John Brenkman points out:

Lacan's project has been the attempt to give language and intersubjectivity primacy . . . He recognizes that the *Umwelt*, the environment or outer world, of [the infant] is preeminently social. From birth, the human being is affected by actions, gestures, wishes, and intentions that are already imbued with the symbolic and that occur within the constraints of specific, historically determined institutions. ²²⁵

That is, the subject is "radically dependent on the field of the Other" for identity and for the language that eventually makes interaction possible. ²²⁶ Recall that Althusser sees the family configuration as an ideology which waits for each of us to be born and assigns our respective places or roles. The family as social and socializing institution "limits the possibilities of interaction which emerge in the experience of speech . . ." ²²⁷

Many scholars associated with CLS have identified legal institutions and processes as "arrangers" of everyday life, shaping and constraining the situations and interactions we experience. Further, critics of legal ideology can be conceived as cultural analysts who disclose or bring to the surface hidden or unconscious belief systems concerning the law. However, while such metaphors are suitable for ideology critique generally, they represent an impoverished conception of psychoanalysis. Peter Gabel's recent reflections on collective desire provide a richer analogy between the critical-legal and the social-psychoanalytical projects.

224. J. BRENKMAN, *supra* note 221, at 149.

225. *Id.* at 152. With respect to the ego's function, "there are no reality-altering actions that are not already situated in and affected by the social network of a human community." *Id.* at 155.

226. *Id.* at 152. For an empirical psychoanalytic-oriented inquiry into the self-other relationship, in support of Brenkman, see Pipp, *Sensorimotor and Representational Internal Working Models of Self, Other, and Relationship: Mechanisms of Connection and Separation*, in *THE SELF IN TRANSITION: INFANCY TO CHILDHOOD* (D. Cicchetti & M. Beeghly eds. 1990). See generally Keil, *Constraints on Knowledge and Cognitive Development*, 88 *PSYCHOLOGICAL REV.* 197 (1981) (regarding the constraints of language).

227. J. BRENKMAN, *supra* note 221, at 174.

2. Desire

"In Lacanian terms, it is from the Other that the subject receives the signifiers of his or her desire. The Other can refer to the child's mother [who *represents* the community in her initial, exclusive hold on discourse; but what] is radically Other is precisely 'the concrete discourse of [the subject's] surroundings.'"²²⁸

Gabel's account of social desire, which attempts to move beyond Lacan (who insisted on the unintelligibility of desire and was "as unable to capture what we are alienated *from* as Freud was"),²²⁹ posits a collective desire for social confirmation and mutual recognition. He suggests that the social self is often alienated or blocked from such real desire by our *privatization* of desire and by collective *denial* of that social dimension.²³⁰ The alienation or blockage, in Gabel's somewhat ambiguous scheme, is reproduced (by repetitive repression of desire to maintain social roles) and maintained (by deference to "phantom" social structures for identity and by reciprocal projection of that "given" world) in a circle of denial and desire.²³¹ Legal culture exemplifies role-based interaction wherein political or moral desire is privatized in subjection to an externalized social authority.²³²

John Brenkman's psychoanalytic theory of culture, another attempt to employ and go beyond Freud and Lacan, is similar in several respects to Gabel's approach. Freud, in his neglect of the social constitution of the ego and the social organization of "reality," grants to the ego only the ability to adjust to reality.²³³ Lacan's restatement of Freudianism in social and cultural terms (as a theory of the subject's constitution by and through

228. *Id.* at 146 (quoting and translating J. LACAN, *supra* note 46, at 319).

229. See *supra* note 114; see also *supra* text accompanying note 97. Gabel's (and Brenkman's) attempt to go beyond Lacan will, of course, be viewed by Lacanians as superficial. See, e.g., E. RAGLAND-SULLIVAN, *supra* note 96, at 66-67:

Psychologists who look for truth in "resolution" are destined to be disenchanted. Even the Other's Desire, which makes up the unconscious discourse, is not a *Dasein* (being or existence), for it can only ever be partially captured, and even that indirectly, intersubjectively, and transindividually.

The subject [of identifications and objectifications—the *moi*] is an unbridgeable gap between a person's perceptions and alienation in relation to an external *Gestalt*, an internal discourse, and Desire.

Therefore, for Lacanians,

Lacan's picture of the human subject accurately conveys the tragedy of natural being. We are faced with a choice between individuation through psychic Castration (that is, learning difference by alienation into language, social conventions, and rules) or failure to evolve an identity adequate to social functioning.

Id. at 273.

230. See *supra* notes 193-94 and accompanying text.

231. See *supra* note 196.

232. See *supra* notes 200-01.

233. See J. BRENKMAN, *supra* note 221, at 166-68.

language) initiates an immanent critique of psychoanalysis that Brenkman incorporates into his own Neo-Marxian critique:

The critical theory of society and culture requires a theory of subjectivity and lived experience, and in turning to psychoanalysis to develop that, it discovers another task as well: to disclose those points in psychoanalytic theory where historical forms of domination—principally the social division of labor and the social organization of sexual difference—have to become integral and primary elements of that theory itself.²³⁴

Gabel, too, seeks an enrichment of the critical-legal project by reference to psychoanalytic conceptions. The identification of social desire and its repression illuminates the externalization and maintenance of legal authority.

Brenkman's reassessment of psychoanalysis also inspires hope for social change. Repression of desire, which blocks the "subject's access to his or her own history," is the ego's response to the conflict between desire and present reality.²³⁵ If reality, however, is essentially social, then a third orientation "toward the future and toward another reality" appears.²³⁶ This critical orientation implies the possibility of renouncing reality "not in the mode of repression, which hampers the possibilities of the present under the impact of an un-lived and untold past, but in the mode of a liberation which, comprehending the past and demanding a new future, condemns the present."²³⁷

Gabel's recognition of the need to reconstitute legal culture by challenging "given" roles and contingent social structures provides an example of Brenkman's "third orientation." Moreover, the problematic questions of the existence and operation of legal ideology are directed by Gabel into a reflection upon the division between desire (experienced and perceived in others) and collective denial, between our privatized ideals and our social selves, and between contingent realities.

3. Cultural Self-Criticism

The psychoanalytic project inspired by Lacan's Freud also provides a model of self-criticism for the critic of legal ideology. Althusser's Lacanian conception of the eternity of ideology contrasts sharply with the Marxian notion of ideology as *false* consciousness, a term which suggests that the critic is outside ideology. Indeed, the critic, at best, encourages cultural self-awareness, hence the significance of the early Habermas' picture of psychoanalysis as fundamentally self-reflective and his analogy between a

234. *Id.* at 150.

235. *Id.* at 167-68.

236. *Id.* at 168.

237. *Id.*

patient's self-consciousness and social liberation. In Brenkman's construction:

Human knowledge cannot, especially when it pretends to be a scientific knowledge of the forms of everyday cognition, detach itself from the lived experiences out of which genuine subjectivity emerges.

This problematic, in which science is inseparable from politics in the development of an understanding of human social, psychological, and cultural life, never becomes visible in Freud and never completely breaks into the clear in Lacan.²³⁸

Gabel, I think, would agree, as he links his social theory directly to politics: "transcendent social knowledge can emerge only from transcendent social experience."²³⁹

I would go further, avoiding the reduction to politics, and maintain that *all* theory as well as everyday thought, is inseparable from ideology if we take ideology to mean those belief systems that are often hidden (or unconscious) but are subject to self-critical disclosure and discourse. Informed by the psychoanalytic tradition, such belief systems can now be seen to include changeable social desire, repression and reality

CONCLUSION

One of the most profound criticisms of CLS is that it does not really exist—people "belong" to the movement, conferences are held, symposia are published, but the essential legal theory is often elusive. Those who criticize CLS by attacking Roberto Unger find, to their surprise, that they have only criticized Unger. If the same critics, wisely, reattack Unger, Duncan Kennedy and Morton Horwitz, the critique might be ignored as a harmless, but typically unenlightened, reification of CLS. The critic's difficulty results from the eclectic and disjointed character of a new intellectual movement.

Works such as David Kennedy's exploration of Critical Theory and Structuralism are particularly helpful in giving bearings to CLS adherents and enemies.²⁴⁰ Jack Balkin's exposition of deconstruction, likewise, was a

238. *Id.* at 160-61.

239. Gabel, *On Passionate Reason: Transcending Marxism and Deconstruction*, 4 *TIKKUN* 9, 11 (Nov./Dec. 1989). Gabel confirms "the centrality of engaged, intuitive comprehension to the construction of psychoanalytic knowledge," then explains:

The kind of critical social thought that I'm talking about here demands that people passionately throw themselves forward into the lived experience of social phenomena that surround them and attempt to illuminate through evocative description, rather than detached analysis or "explanation," the universal realizations and distortions of social desire that these diverse phenomena share across the cultural richness of their differences.

Id. at 11.

240. See Kennedy, *supra* note 10.

welcome but belated guide to much that was presumed in the CLS canon.²⁴¹ The potential for CLS to be understood, much less to contribute to contemporary legal discourse, is dependent upon studies that seek the connections between CLS scholarship and its methodological forebears. And, just as traces of Marx and Habermas, Lévi-Strauss and Derrida, need to be identified and discussed, adopted or revised, the traces of Freud (and Marcuse and Lacan) have yet undetermined significance.

241. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

